FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE GEO GROUP, INC., *Plaintiff-Appellant*, and UNITED STATES OF AMERICA, *Plaintiff*, v. GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA,* in his official capacity as Attorney General of the State of California, *Defendants-Appellees*, and STATE OF CALIFORNIA, *Defendant*.	No. 20-56172 D.C. Nos. 3:19-cv-02491-JLS-WVG 3:20-cv-00154-JLS-WVG OPINION

* Under Fed. R. App. P 43(c)(2), Rob Bonta has been substituted for his predecessor, Xavier Becerra, as California Attorney General.

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, and THE GEO GROUP, INC., *Plaintiff*, v. GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California; STATE OF CALIFORNIA, *Defendants-Appellees.*	No. 20-56304 D.C. Nos. 3:19-cv-02491-JLS-WVG 3:20-cv-00154-JLS-WVG

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted June 7, 2021
Pasadena, California

Filed October 5, 2021

Before: Mary H. Murguia, Bridget S. Bade, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Lee;
Dissent by Judge Murguia

SUMMARY[**]

Preemption / Intergovernmental Immunity

The panel reversed the district court's orders denying the motion of the United States and GEO Group, Inc., a company that operates two private immigration detention centers, for a preliminary injunction, and granting the State of California's motions to dismiss and for judgment on the pleadings, in an action brought by the United States and GEO challenging California Assembly Bill 32 ("AB 32"), which phases out all private detention facilities within the state.

The United States Immigration and Customs Enforcement (ICE) relies exclusively on private detention centers in California. The district court denied appellants United States' and GEO's request for preliminary injunctive relief based on its finding they were unlikely to succeed on the merits.

The panel concluded that appellants were likely to succeed on the merits, and the other preliminary injunction factors tipped in their favor.

As a preliminary matter, the panel held that appellants' claims were justiciable. By the end of the decade, AB 32 will deprive the United States of the option to continue contracts with GEO and its other contractors. That result inevitably flows from the statutory language nullifying any

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contract renewals. The panel concluded that based on the United States' standing alone, it had authority to hear the case.

The panel held that AB 32 conflicted with federal law and could not stand. Under the Supremacy Clause, a state law must fall if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Under the presumption against preemption, courts assume that federal law does not supersede the historic police powers of the states unless there is a clear and manifest congressional purpose.

The panel held that the district court erred in finding that that the presumption against preemption applied, and that federal law did not preempt AB 32 under conflict preemption. The presumption does not apply to areas of exclusive federal regulation, such as detention of immigrants. California did more than just exercise its traditional state police powers – it impeded the federal government's immigration policy. California has not historically regulated the conditions of detainees in federal custody, and in particular those housed in immigrant detention centers. In short, AB 32 did not regulate a field which the states had traditionally occupied. In addition, Congress unambiguously granted the Secretary of the Department of Homeland Security ("DHS") broad discretion over immigrant detention, including the right to contract with private companies to operate detention facilities. The panel rejected California's and the ACLU's argument that Congress never gave the Secretary of DHS discretion to contract with private parties to operate detention facilities, even though the federal government has relied on private immigration detention centers for decades. The panel also rejected their arguments that 8 U.S.C. § 1231(g) implied a

limit on the Secretary's discretion, and 8 U.S.C. § 1103(a)(11) permitted the Secretary to contract out detention facilities to states only. Finally, AB 32 conflicted with the Secretary's statutory power to contract with private detention facilities. AB 32 cannot stand because it conflicts with this federal power and discretion given to the Secretary in an area that remains in the exclusive realm of the federal government, and it bars the Secretary from doing what federal immigration law explicitly permits him or her to do.

The panel held that AB 32 discriminated against the federal government in violation of the intergovernmental immunity doctrine. A State violates the discriminatory aspect of intergovernmental immunity when it treats the state more favorably than the federal government without justification. Discrimination exists where the net effects of a state law discriminate against the federal government. The panel held that under this net effect analysis, AB 32 discriminated against the federal government where AB 32 required the federal government to close all its detention facilities, including its ICE facilities, and will not require California to close any of its private detention facilities until 2028.

The panel therefore held that the United States and GEO were likely to prevail on the merits of their motion for a preliminary injunction. The panel held further that the remaining injunction factors also tipped in appellants' favor. Constitutional injuries are irreparable harm. Because AB 32 facially discriminated against the federal government, the United States suffered an irreparable harm. In addition, by establishing a likelihood that AB 32 violated the U.S. Constitution, appellants established that both the public interest and the balance of equities favored a preliminary injunction.

The panel remanded for further proceedings.

Dissenting, Judge Murguia would hold that the district court acted within its discretion in denying a preliminary injunction because the United States and GEO were unlikely to succeed on their conflict-preemption and intergovernmental-immunity claims. She would apply the presumption against preemption and would uphold the district court's determination that the presumption had not been overcome by Congress's clear and manifest intent with respect to the ICE facilities at issue in this case. She wrote that AB 32 said nothing about immigration, and it did not mention the federal government. Therefore, there was no justification for treating AB 32 as a regulation of immigration rather than one of health and safety. Although AB 32 applied to immigration detention facilities in California, it did not apply only to those facilities, rather, it applied to a variety of federal and state facilities. In addition, Congress has not expressed "clear and manifest" intent to overcome the presumption. AB 32 was not preempted, and the United States and GEO were not entitled to a preliminary injunction on the issue.

Further, Judge Murguia would hold that AB 32 does not violate intergovernmental immunity where AB 32 does not discriminate against the federal government and does not directly regulate the federal government. In addition, Judge Murguia dissented from the majority's choice to proceed with de novo review of the remaining preliminary injunction factors, which went far beyond the "limited and deferential" abuse-of-discretion review prescribed by case law.

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OPINION

LEE, Circuit Judge:

In 2019, California Governor Gavin Newsom signed a bill, AB 32, that phases out all private detention facilities within the state. But because of seasonal and other fluctuations in immigration, the United States Immigration and Customs Enforcement (ICE) relies exclusively on private detention centers in California. California's law would thus compel the United States to shutter all ICE detention centers within the state. In contrast, AB 32 carves out many exceptions for the state's various private detention centers.

The United States—along with The GEO Group, Inc., a company operating two of the private immigration detention centers—sued California and sought a preliminary injunction, arguing that AB 32 conflicts with federal law and violates intergovernmental immunity. The district court ruled largely in favor of California, holding that the well-being of detainees falls within a state's traditional police powers. We disagree: California is not simply exercising its traditional police powers, but rather impeding federal immigration policy.

Under our preemption principles, states may not enact laws that hinder "the accomplishment and execution of the full purposes and objectives of Congress." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). Immigration—in particular, the detention of undocumented immigrants and those slated for removal—falls within the core of exclusive federal powers. And Congress has given the U.S. Department of Homeland Security (DHS) Secretary the statutory authority to contract with private detention facilities. AB 32, however, intrudes into the federal sphere

of authority by barring the Secretary from exercising his or her statutory power.

California's law also does not pass muster under the doctrine of intergovernmental immunity, which prevents states from directly regulating or discriminating against the federal government. California has discriminated against the United States because AB 32 provides certain exemptions for state agencies without offering comparable ones for the federal government.

We reverse the district court's orders (i) granting California's motions to dismiss and for judgment on the pleadings and (ii) denying the United States' and GEO's motion for a preliminary injunction.

BACKGROUND

I. California Phases Out Private Detention Facilities in the State.

In 2019, then-Acting DHS Secretary Matthew Albence told the House of Representatives Committee on Appropriations that the "influx at the border has especially strained ICE's detention resources." He reported that the number of new detainees had surged 79% in a single year. The federal government houses these detainees in detention facilities until they are either removed from the country or released.

ICE, however, does not build or operate any immigration detention facilities because of "significant fluctuations in the number and location of removable aliens apprehended by DHS," according to the federal government. To avoid spending large sums of money on government-owned buildings that may remain vacant if immigration wanes, ICE

relies only on privately operated detention facilities, including in California. GEO contracted with the federal government in 2019 to operate two such facilities in California.

Meanwhile, not too long after Acting Secretary Albence testified before Congress, Governor Gavin Newsom signed AB 32 into law, which bans private detention facilities in California within this decade. The author of AB 32 explained that the bill provides "a general ban of for-profit, private detention facilities in California—including facilities used for immigration detention." Sen. Judiciary Comm., Bill Analysis of A.B. 32, 2019–2020 Reg. Sess. (Cal. 2019). "We've all seen the current humanitarian crisis play out along the southern border," he continued. *Id.* "No human being deserves to be held in the horrific conditions we've been seeing in these for-profit, private facilities." *Id.*

AB 32 has three sections:

Section 1: It amends the California Penal Code by adding § 5003.1, which bans California Department of Corrections and Rehabilitation from entering or renewing a contract with a private, for-profit prison facility located "in or outside of the state." Cal. Penal Code § 5003.1(a)–(b). But the law provides an exception for California's private prisons "in order to comply with the requirements of any court-ordered population cap." *Id.* § 5003.1(e).

Section 2: It introduces §§ 9500–9505 to the California Penal Code. First, § 9500 provides definitions:

> (a) "Detention facility" means any facility in which persons are incarcerated or otherwise involuntarily confined for purposes of execution of a punitive

> sentence imposed by a court or detention pending a trial, hearing, or other judicial or administrative proceeding.
>
> (b) "Private detention facility" means a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement *with a governmental entity.*

Id. § 9500 (emphasis added).

Then § 9501 establishes the general rule that "a person shall not operate a private detention facility within the state." *Id.* § 9501. The remaining provisions specify exemptions to the general rule. Most of § 9502's exemptions apply only to certain facilities operating under California state law. *See id.* § 9502(a)–(b), (d), (f)–(g). Two of the exemptions are facially neutral, but one of them exempts school detention centers, which the federal government does not operate. *See id.* § 9502(c), (e). Finally, § 9505 provides two more exemptions. First, a "private detention facility that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract, *not to include any extensions made to or authorized by that contract*." *Id.* § 9505(a) (emphasis added). ICE entered into the contracts before 2020, so they fall within the safe-harbor provision. At the same time, all of ICE's contracts include several extensions, which fall outside this exception. Second, § 9505 exempts a private detention facility renewed under § 5003.1(e). As noted above, § 5003.1(e) provides an exception to comply with court-ordered population caps in state prison.

Section 3: It provides that the act's provisions are severable.

II. The United States and GEO Sue California.

Shortly after the passage of AB 32, Appellants United States and GEO sued Governor Gavin Newsom and then-Attorney General Xavier Becerra (collectively, "California"), seeking a preliminary and permanent injunction against AB 32. They argued that AB 32 was preempted and violated the intergovernmental immunity doctrine. California, in turn, moved to dismiss GEO's complaint and for a judgment on the pleadings for the federal government's complaint.

The district court granted California's motions, found that Appellants were unlikely to succeed on the merits, and denied the request for a preliminary injunction.

STANDARD OF REVIEW

We review a denial of a preliminary injunction for abuse of discretion. But "the district court's interpretation of the underlying legal principles is subject to de novo review, and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks and alterations omitted).[1] We review de novo the grant of a motion to dismiss for failure to state a claim as well as a

[1] Contrary to the dissent's suggestion, we are not engaging in a de novo review of the denial of a preliminary injunction. Rather, we hold that the district court erred in its legal analysis of the preemption and intergovernmental immunity issues. And a district court abuses its discretion when it makes an error of law in denying a preliminary injunction.

motion for judgment on the pleadings. *See Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198, 1204 (9th Cir. 2020).

ANALYSIS

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The key question is whether GEO and the United States are likely to succeed on the merits. We conclude that they are likely to do so, and that the other factors tip in favor of them.

I. Appellants' Claims Are Justiciable.

To begin, California questions whether Appellants have standing. Because GEO and the other private detention companies contracted with the United States in 2019, AB 32's exception for operations existing before January 1, 2020 applies. The initial period for these contracts ends in 2024, at which time the United States may terminate the contracts. According to California, since it is unknown whether the federal government will exercise this option, Appellants' only possible injury is a "future contingency that may or may not occur."

We reject this argument. By the end of the decade, AB 32 will deprive the United States of the option to continue its contracts with GEO and its other contractors. That result inevitably flows from the statutory language nullifying any contract renewals. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the

disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974). Based on the United States' standing alone, we have the authority to hear this case. *See Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1647 (2017) (explaining that when there are multiple plaintiffs, "at least one plaintiff must have standing to seek each form of relief requested in the complaint.").

II. AB 32 Conflicts with Federal Law and Cannot Stand.

The Supremacy Clause makes the laws of the United States "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. So a state law must fall to the wayside if "the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hughes*, 136 S. Ct. at 1297 (internal quotation marks omitted) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Under this principle of conflict preemption, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Two cornerstones guide our preemption analysis. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotations omitted). Second, under the so-called presumption against preemption, courts should assume that federal law does not supersede the historic police powers of the states "unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Medtronic*, 518 U.S. at 485).

The district court erred in finding that the presumption against preemption applies, and that federal law does not

preempt AB 32 under conflict preemption. This presumption does not apply to areas of exclusive federal regulation, such as detention of immigrants. In any event, Congress unambiguously granted the DHS Secretary broad discretion over immigrant detention, including the right to contract with private companies to operate detention facilities. Given this congressional purpose, AB 32 conflicts with the Secretary's statutory power and discretion.

A. The presumption against preemption does not apply to AB 32.

The district court applied the presumption against preemption, finding that AB 32 regulates the health and safety of people detained within the State of California. And health and safety, the court reasoned, fall within a state's traditional police powers.

The district court, however, erred by defining the relevant regulated area too broadly. To determine the regulated activity, we first look at "the language of the statute itself," which "must ordinarily be regarded as conclusive." *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1029–30 (9th Cir. 1998). The context of the state's regulation matters, too. A state cannot automatically trigger the presumption by merely asserting some generic police power divorced from the context of the challenged regulation. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (holding that a state's general police power over fraud did not trigger the presumption because states had not "traditionally occupied" the field of "[p]olicing fraud *against federal agencies*" (emphasis added)); *see also United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012).

If we look at the language of AB 32 as well as its context, it becomes clear that California law regulates the federal government's detention of undocumented and other removable immigrants. Sections 9500 and 9501 prohibit operating a detention facility "pursuant to a contract . . . with a governmental entity." Cal. Penal Code § 9500–9501. AB 32 does not limit "governmental entity" to only state or local governments; it also purposefully includes the federal government, which detains thousands of people within California. AB 32's intentional inclusion of the federal government stands in stark contrast with other provisions in the California Penal Code that apply to the treatment of people held only in state prisons or county jails. *See, e.g.*, Cal. Penal Code § 2650 (stating that the "Mistreatment of Prisoners" provisions apply only to someone "sentenced to imprisonment in the state prison" and, in some cases, county jail); Cal. Penal Code §§ 4000–4032 (setting standards for treatment of people in the "common jails in the several counties of this State"). So the plain language of the statute targets in large part the federal government and its detention policy.

And the context underscores that California did more than just exercise its traditional state police powers—it impeded the federal government's immigration policy. Unlike the state government, the federal government does not enjoy any exemptions from AB 32. If federal detainees might face health and safety risks in private detention centers, then state detainees presumably endure the same dangers as well—yet California curiously provides numerous exemptions for state detainees. If anything, in AB 32, California appears to show less concern for the well-being of its own detainees than it does for persons under federal detention. In short, California's mantra-like invocation of "state police powers" cannot act as a talisman

shielding it from federal preemption, especially given that the text and context of the statute make clear that state has placed federal immigration policy within its crosshairs.[2]

The district court erred in relying on language from *United States v. California* to reason that California exercised its traditional state police powers. 921 F.3d 865 (9th Cir. 2019). In that case, we considered AB 103, which, among other things, authorized the California Attorney General to collect information about the health and welfare of immigrant detainees in privately run facilities. *Id.* at 875–76. We noted in dicta that neither party "dispute[d] that California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders." *Id.* at 886.

But we made clear in *California* that the statutory provision did not intrude on federal powers because the "[m]ere collection of such factual data does *not (and cannot) disturb any federal . . . detention decision*." *Id.* at 885 (emphasis added). That law simply did "not regulate whether or where an immigration detainee may be confined." *Id.* In contrast here, AB 32 can and does "disturb" the federal government's "detention decision" because it "regulate[s] . . . where an immigration detainee

[2] If we accepted California's argument, then a state could essentially dictate the policies of the federal prison system. For example, suppose hypothetically that Colorado enacts a law mandating eight hours of open space time for all inmates within the state to ensure their mental well-being. That would mean that the federal "supermax" prison in Colorado housing the most dangerous terrorists and criminals would have to provide those eight hours of open space time to them. The dissent points out that there are federal rules governing prisoners that would preempt state law. So, too, here: as explained, Congress gave the Secretary power to detain immigrants in any "appropriate places of detention."

may be confined" by banning the use of private detention facilities. *Id.* The *California* court made clear that a state cannot make such an intrusion into federal policy.

Having defined the relevant area regulated by AB 32, we next ask if California has historically regulated the conditions of detainees in federal custody, and in particular those housed in immigrant detention centers. *Wyeth*, 555 U.S. at 565. California does not even try to argue that it has such a historical practice. Nor could it. No such history exists. Indeed, the federal government exclusively regulates immigration detention. *See United States v. Locke*, 529 U.S. 89, 99 (2000) (holding that the presumption does not apply in areas with a "history of significant federal presence"); *City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149, 1155 (9th Cir.), *amended sub nom. City of Los Angeles by & through Dep't of Airports v. AECOM Servs., Inc.*, 864 F.3d 1010 (9th Cir. 2017) (noting that the Supreme Court's decision in *Wyeth* clarified that the holding in *Locke* meant only that the "presumption [] accounts for the historic presence of state law *but does not rely on the absence of federal regulation*") (internal quotations omitted).

The federal government alone has always set immigration policy. And that includes detention and removal of immigrants. "A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice." *Arizona v. United States*, 567 U.S. 387, 409 (2012); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 348 (2005) ("Removal decisions . . . may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances." (internal quotation marks omitted)). Our

case is thus not like *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016), which involved an identity fraud state law that "touched" upon immigration. Nor is it like *Knox v. Brnovich*, 907 F.3d 1167, 1177 (9th Cir. 2018), which addressed whether a state law limiting who can collect early election ballots "touched" upon the federal "field of letter carriage and delivery." Here, AB 32 does not just "touch" upon the area of immigration detention; it bulldozes over the federal government's ability to detain immigrants by trying to ban all the current immigration detention facilities in California.

In short, AB 32 does not regulate a field which the states have traditionally occupied. To the contrary, it tries to regulate an area—detention of immigrants—that belongs exclusively in the realm of the federal government. The presumption against preemption thus does not apply.

B. ICE has broad statutory authority to contract for private detention facilities.

Perhaps recognizing that California's law directly undermines the United States' exclusive authority to detain immigrants, California and the American Civil Liberties Union (ACLU) advance a rather audacious argument: They insist that Congress never gave the DHS Secretary discretion to contract with private parties to operate detention facilities, even though the federal government has relied on private immigration detention centers for decades. If this argument is correct, then ICE lacks statutory authority to privately contract out detention operations. And no conflict

preemption could exist because, well, there would be no federal law that conflicts with AB 32.[3]

Fortune may favor the bold, but not so if it flies against the statutory text and structure as well as historical tradition. Contrary to California's assertions, Congress gave the Secretary broad discretion to arrange for appropriate detention facilities, including contracting with private companies to operate them.

As the Supreme Court has emphasized repeatedly, the federal government has "broad, undoubted power over the subject of immigration." *Arizona*, 567 U.S. at 394. That is so because "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Id.* at 395 (citations omitted). Thus, "a principal feature of the removal system is the broad discretion exercised by immigration officials." *Id.* at 396.

This broad discretion applies to immigration detention. Congress made that clear. We see it in 8 U.S.C. § 1231, which states that the Secretary "shall arrange for *appropriate* places of detention for aliens . . . ." 8 U.S.C. § 1231(g)(1) (emphasis added). The word "appropriate" represents "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *See Michigan v. EPA*, 576 U.S. 743, 752 (2015) (noting the "capaciousness" of the term "appropriate and

[3] The dissent notes that we spend a quarter of our opinion on addressing whether ICE has statutory authority to contract with private facilities. We do so only because California and the ACLU devoted most of their briefs challenging the Secretary's statutory power.

necessary" in the Clean Air Act). The statute does not limit the Secretary to housing detainees in "appropriate federal" or even "appropriate governmental" places of detention. Rather, as we have recognized in a different context, 8 U.S.C. § 1231(g) grants the Secretary "broad discretion in exercising his authority to choose the place of detention for deportable aliens." *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1440 (9th Cir.), *amended*, 807 F.2d 769 (9th Cir. 1986). The Secretary also has the power "to make contracts . . . as may be necessary and proper." 6 U.S.C. § 112(b)(2). In short, this statutory language—"appropriate" and "necessary and proper"—is a hallmark of vast discretion.[4]

Congress has also made clear in other ways that it delegated to the Attorney General (and now the DHS Secretary) the power to contract with private immigration detention centers. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress required the executive branch to report to Congress the number of criminal aliens "released from detention facilities of [INS] (whether operated directly by the Service *or through contract with other persons or agencies*)." *See*

[4] The dissent points out that § 1231 does not explicitly mention contracting with private immigration detention centers, but that 18 U.S.C. § 4013(a)—which governs federal prisoners in state facilities—explicitly allows the federal government to enter into agreements with "private entities" to house those held in custody by the U.S. Marshal. The dissent thus reasons that the DHS Secretary does not have the statutory power to contract with private entities. But Congress already provided plenary power to the Secretary to "arrange for appropriate places of detention for aliens." 8 U.S.C. § 1231(g)(1). So there was no need to specify private parties. In contrast, the U.S. Marshal does not have such broad powers of detention for federal prisoners, and Congress thus specified the power to contract with private parties.

IIRIRA, sec. 386, 110 Stat. at 3009–654 (emphasis added) (codified at 8 U.S.C. § 1368(b)(2)(A)(i)(I)). By that time, the executive branch had been contracting with private companies to operate immigration detention facilities for over ten years. *See* Joan Mullen, Corrections and the Private Sector, NAT'L INST. OF JUSTICE: RSCH. IN BRIEF, Oct. 1984. Indeed, by 1991, private companies operated half of all immigration detention facilities. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-91-21, PRIVATE PRISONS: COST SAVINGS AND BOP'S STATUTORY AUTHORITY NEED TO BE RESOLVED 20 (1991).

And to this day, Congress continues to pass appropriation bills that specifically earmark money for ICE to contract with private detention facilities. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. F, tit. II, § 215(a), 134 Stat 1182, 1457 (2020); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 215(a), 133 Stat. 2317, 2507 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 210, 133 Stat. 13, 23 (2019); *see also* Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 386, 110 Stat. 3009 (1996) (contemplating detention facilities "operated directly by [ICE] or *through contract with other persons or agencies*" (emphasis added)). *Cf. Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937) ("Whatever doubt may be entertained as to the intent of Congress . . . Congress appears to have recognized the validity . . . by [passing several] appropriation Acts"). Common sense dictates that

Congress would not explicitly provide funding for an allegedly unauthorized and unlawful activity.[5]

California and the ACLU resist this textual and common-sense reading of the Secretary's statutory powers. According to them, 8 U.S.C. § 1231(g) implies a limit on the Secretary's discretion, and 8 U.S.C. § 1103(a)(11) permits the Secretary to contract out detention operation to states only. Neither of these arguments withstands scrutiny.

California and the ACLU argue that the second sentence of § 1231(g)(1) limits the Secretary's discretion. It reads:

> The Attorney General shall arrange for appropriate places of detention for aliens

[5] The district court did not question that the Secretary generally has the authority to contract out detention operations. Instead, the district court found that these statutes did not demonstrate a clear and manifest intent that ICE could contract with private parties to operate detention facilities in part because the statutory language does not explicitly mention private detention facilities. But the relevant question is whether Congress clearly and manifestly granted the Secretary the discretion to enter such a contract. And the answer is clearly "yes." Taken to its logical conclusion, the district court's ruling would require Congress to provide a detailed laundry list of every possible type of expenditure to prevent states from handcuffing the federal government's authority to spend money on it. Otherwise, a state could argue that Congress did not clearly and manifestly intend to prevent state regulation of the federal government's ability to enter into contracts. In any event, DHS issued a regulation that specifically allows the agency to contract with private detention facilities, though the parties dispute the statutory basis to promulgate that regulation. 48 C.F.R. § 3017.204-90 (providing that ICE "may enter into contracts of up to fifteen years' duration for detention or incarceration space or facilities, including related services"); *see also Wyeth*, 555 U.S. at 576 ("This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements").

> detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Service—Salaries and Expenses", without regard to section 6101 of Title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

8 U.S.C. § 1231(g)(1). They argue that the prefatory phrase of that second sentence—"When *United States Government facilities* are unavailable or facilities adapted or suitably located for detention are unavailable for rental"—makes clear that only federal facilities can house immigrant detainees. Put another way, the word "appropriate" in the first sentence—the Secretary "shall arrange for *appropriate* places of detention of aliens"—refers to "United States government facilities" only.

But such a reading goes against the ordinary meaning of the word "appropriate." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, 70 ("One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise."). The word "appropriate" means "especially suitable or compatible : FITTING." *See* Merriam-Webster Dictionary. Nothing in § 1231(g)(1) or any other statutory provision suggests that "appropriate" means the "United States government" only. We know this because another statutory provision, 8 U.S.C. § 1103(a)(11), expressly allows the United States to contract with state and

local governments to house immigrant detainees. California and the ACLU's proffered definition of "appropriate" thus conflicts with the well-established canon that statutory provisions must be read in harmony. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" (internal citations omitted)).[6]

California and the ACLU next seize on 8 U.S.C. § 1103(a)(11) to argue that the Secretary may *only* contract out detention operations to "a State or political subdivision of a State." Because Congress only mentioned agreements with states and localities (and not with private companies), it must mean that the Secretary cannot contract with private companies, according to California and the ACLU.

We reject such a reading. The negative inference canon generally does not apply if the list of powers is not exclusive. *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 945 (9th Cir. 1998). Section 1103(a)(11) does not purport to enumerate the exclusive instances when the Secretary may place immigrants in non-federal detention. The statutory provision does not use the words "only," "exclusively," or similar words.[7] And without such a word

[6] So what does the second sentence in § 1231(g)(1) mean? It appears to address when the Secretary can spend money to build facilities; it does not purport to limit how the Secretary houses aliens. If the United States wants to build a facility, it can do so only if there are (i) no United States facilities available and (ii) no other places, including private detention centers, available for rent.

[7] In fact, § 1103(a)(11) does not appear to expound on the Secretary's power. Instead, § 1103(a)(11) explains the Attorney

in the statute, the negative inference canon can apply only if "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Revenue Corp*., 568 U.S. 371, 381 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). And here, we face "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Id.* (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

First, such a reading clashes with the canon against implied repeal. As noted before, the United States has contracted with private immigration detention facilities at least as far back as 1984, and indeed, the federal government housed a substantial portion of undocumented and removable immigrants in private facilities by the early 1990s. It would seem highly unusual for Congress to usher in a sea change in the federal government's power to detain immigrants in such an indirect and vague manner when it enacted § 1103(a)(11) as part of the IIRIRA in 1996. *Cf.* Scalia and Garner at 327 ("[I]f statutes are to be repealed, they should be repealed with some specificity."). In fact, the IIRIRA fortified the executive branch's power to contract with private detention facilities by formally codifying § 1231(g), which empowers the executive branch to place immigrants in "appropriate places of detention." 8 U.S.C. § 1231(g) (codifying Pub. L. No. 414, ch. 477, § 242(c), 66 Stat. 163, 210 (1952)).

Second, the text and structure of § 1103 suggest that the provision is about federalism—specifically, the anti-

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General's powers. Here, "the Attorney General" does not mean "the Secretary of Homeland Security." *See* §1103(a)(1).

commandeering doctrine—and not about specific detention operations.

We begin with the text of § 1103(a)(11). Sub-section (A) authorizes the Attorney General to make payments to states related to their "administration and enforcement of the laws relating to immigration" if the states' actions were taken under "an agreement with a State." *Id.* § 1103(a)(11)(A). The "administration and enforcement of the laws" contemplates far more than just detention operations.

And § 1103(a)(11)(B) then allows the Attorney General to enter into "cooperative agreement[s]" with States for state-run immigration detention facilities. By setting the conditions under which the United States can house immigrant detainees in state and local government facilities, § 1103(a)(11) clarifies that the federal government cannot commandeer state and local governments into serving federal functions.

This reading make sense in historical context. This section was first enacted in 1996—a year before the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997) resolved a circuit conflict and held that the federal government cannot commandeer states or local officials for background checks. It was thus likely enacted with federalism in mind, not as an exclusive enumeration of delegated powers.

The structure of the 1996 version of 8 U.S.C. § 1103 supports this federalism-based interpretation. *See Kucana v. Holder*, 558 U.S. 233, 246 (2010) (interpreting a provision in line with its neighboring provisions). This section appears at the very beginning of Chapter Twelve of Title Eight—the Chapter addressing "Immigration and Nationality." It is

titled "Powers and duties" and begins sub-section (a) by discussing the Attorney General's powers.[8] 8 U.S.C. § 1103 (1996). From the outset, this placement suggests that § 1103 is concerned with the broadest delegation of powers, rather than the specifics of any particular area.

Sub-section (a)(1) specifies that the Attorney General "shall be charged with the administration and enforcement of this chapter," which includes § 1231: "Detention." *Id.* § 1103(a)(1) (1996). Sub-sections (a)(2) through (a)(6) establish various supporting powers the Attorney General possesses to carry out his or her duties under Chapter Twelve.[9] These broad grants confirm that § 1103 concerned *general* delegation of powers.

The rest of sub-section (a) provides certain limitations to this general delegation when the immigration power touches other constitutional areas. Thus, sub-sections (a)(7) through (a)(9) concerns the overlap of immigration with foreign affairs.[10] Sub-section (a)(7) empowers the Attorney General, "with the concurrence of the Secretary of State," to establish immigration offices in foreign countries. *Id.* § 1103(a)(7) (1996). Similarly, sub-section (a)(8) allows the

[8] The 1996 version of § 1103 was enacted before the Secretary was delegated the Attorney General's powers.

[9] 8 U.S.C. § 1103(a)(2) (1996) (supervision of employees); *Id.* § 1103(a)(3) (1996) (power to issue regulations); *Id*. § 1103(a)(4) (1996) (authorize or require employees of the Service or the DOJ to perform the duties of the Chapter); *Id.* § 1103(a)(5) (1996) (power to guard the borders); *Id.* § 1103(a)(6) (1996) (authority to confer the Chapter's power on any employee of the United States with the consent of the Department head).

[10] There were two separate sub-sections (a)(8) and (a)(9) enacted in 1996.

Attorney General, "[a]fter consultation with the Secretary of State," to authorize foreign officers to be stationed in the United States. *Id.* § 1103(a)(8) (1996). And sub-section (a)(9) specifies that those foreign officers will have the power and duties of immigration officers. *Id.* § 1103(a)(9) (1996).

The sub-sections addressing the states—which include the precursor to § 1103(a)(11)—are no different. Sub-sections (8) and (9) concerned the overlap of immigration with federalism. Under sub-section (a)(8), if the Attorney General "determines that an actual or imminent mass influx of aliens arriving off the coast of the United States . . . presents urgent circumstances requiring an immediate Federal response," then the Attorney General may empower a "State or local law enforcement officer, *with the consent of the head . . . under whose jurisdiction the individual is serving*," to perform the functions of a federal employee. *Id.* § 1103(a)(8) (1996) (emphasis added). And sub-section (a)(9)—the 1996 precursor to today's § 1103(a)(11)—authorized the Attorney General to expend funds and enter agreements with states to house immigration detainees. *Id.* § 1103(a)(9) (1996).

Read in harmony with their neighboring provisions, these provisions address the special circumstance where the immigration power touches on federalism—not the exclusive times when the Attorney General/DHS Secretary may contract out detention facilities.

Another statute, 8 U.S.C. § 1357(g), passed at the same time as § 1103(a)(11) corroborates this reading. *See* 8 U.S.C. § 1357(g) (1996). That statute begins by granting the Attorney General the power to "enter into a written agreement with a State" to allow state employees to perform immigration functions. 8 U.S.C. § 1357(g)(1). The next

several sections set federalism-related statutory limits on those agreements. *Id.* § 1357(g)(2)–(8). And the statute concludes by explicitly stating that the sub-section must not be construed as permission to commandeer the states. *Id.* § 1357(g)(9)–(10). It thus prohibited commandeering and established federalism-related conditions on agreements between the federal government and the states.

Federalism stands as an integral thread unmistakably woven into the fabric of our Constitution. So it is no surprise that Congress paid heed to the limits of federal power in the statute. In contrast, agreements with private companies do not pose the same constitutional concerns, so it would make sense for Congress not to address such agreements in the same provision. Taken together, these statutory provisions strongly suggests that § 1103(a)(11) clarified boundaries between the federal government and the states. It did not prohibit the executive branch from continuing to rely on private detention centers.

C. AB 32 conflicts with the Secretary's statutory power to contract with private detention facilities.

"A state law is preempted where . . . 'under the circumstances of a particular case, the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hughes*, 136 S. Ct. at 1297 (quoting *Crosby*, 530 U.S. at 373).

Shorn of its creative but ultimately unconvincing arguments, California's case against preemption withers. We are left with these simple facts: the Secretary may arrange for "appropriate" detention facilities (8 U.S.C. § 1231(g)); he or she has the power to contract out detention operations as "necessary and proper" (6 U.S.C. § 112(b)(2)); and the federal government has sole authority

over immigration. The words used in the statute are extremely broad and permissive, and the United States has exclusive domain in this area. It is thus "clear and manifest" that the Secretary has broad power and discretion to arrange for appropriate places of detention, including the right to contract with private companies to operate detention facilities. *Wyeth*, 555 U.S. at 565.

AB 32 cannot stand because it conflicts with this federal power and discretion given to the Secretary in an area that remains in the exclusive realm of the federal government. It bars the Secretary from doing what federal immigration law explicitly permits him or her to do. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1054, 1062 (9th Cir. 2014) ("Preemption analysis must contemplate the practical result of the state law, not just the means that a state utilizes to accomplish the goal." (alteration omitted)). That is a classic case of conflict preemption.

The procurement cases provide an apt analogy. Consider our decision in *Gartrell Construction Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991). There, California required federal contractors to obtain state licensing. *Id.* at 438. To obtain state licensing, contractors had to meet certain standards. *Id.* at 439. At the same time, the Federal Acquisition Regulations required contractors to meet certain similar but potentially different standards. *Id.* We found conflict preemption because the state, "through its licensing requirements, [was] effectively attempting to review the federal government's responsibility determination." *Id.*; *see also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956); *United States v. Virginia*, 139 F.3d 984, 987–89 (4th Cir. 1998); *Student Loan Serv. All. v. District of Columbia*, 351 F. Supp. 3d 26, 62 (D.D.C. 2018).

Here, the conflict is worse. California is not just placing different limits on the federal government's contracting standards; it is trying to ban contractors from contracting with the federal government altogether—even though Congress allows such contracts involving the uniquely national issue of immigration detention.

AB 32 also conflicts with federal law because it improperly tries to cabin the Secretary's statutory discretion. *Crosby v. National Foreign Trade Council* provides a telling example of what states cannot do. 530 U.S. 363 (2000). In *Crosby*, Massachusetts barred state entities from buying goods or services from someone identified as doing business with Burma. *Id.* at 366. Shortly after, Congress passed a law restricting Burma and granting the President power to impose new (or remove old) sanctions at his general discretion. *Id.* at 373–74. In finding conflict preemption, the Court reasoned that Massachusetts's law "undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him." *Id.* at 377. "Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Id.*

The lesson of *Crosby* is that where Congress grants a federal officer broad discretion to pursue an objective (*e.g.*, putting pressure on Burma), states may not cabin the discretion of that officer if doing so would stand as an obstacle to that objective.

That reasoning applies here. Congress has entrusted the Secretary with balancing the many different objectives involved with immigration. *See, e.g.*, *Arizona*, 567 U.S. at 395 ("Immigration policy can affect trade, investment,

tourism, and diplomatic relations for the entire Nation . . . . [For example,] [p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."). To carry out these competing objectives, Congress has given the Secretary discretion to arrange for "appropriate" places of detention and to make contracts as he or she determines to be "necessary and proper to carry out [his or her] responsibilities." 8 U.S.C. § 1231(g)(1); 6 U.S.C. § 112(b)(2). This discretion thus includes the authority to contract with private companies to operate detention facilities.

AB 32 denies the Secretary that discretion. And that denial frustrates the Secretary's efforts to balance the competing objectives involved with immigration. As the United States explained, ICE does not build its own detention centers because immigration flow may surge or taper depending on the season, economic conditions in the United States and elsewhere, the current administration's foreign policy, and a host of other reasons. Seeking flexibility, the Secretary made the policy decision to rely exclusively on private detention centers in California. But AB 32 denies the Secretary that policy choice, forcing the agency to close all private detention facilities. Indeed, as GEO rightly argues, California's action does more than "blunt the consequences" of the Secretary's discretionary action—it altogether *prohibits* the Secretary from taking certain discretionary actions.

III. AB 32 Discriminates Against the Federal Government in Violation of the Intergovernmental Immunity Doctrine.

"Under the Supremacy Clause, 'the activities of the Federal Government are free from regulation by any state.'" *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014)

(quoting *Mayo v. United States*, 319 U.S. 441, 445 (1943)). All parties agree that under the intergovernmental immunity doctrine, a state may not "regulate[] the United States directly or discriminate[] against the Federal Government or those with whom it deals." *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 436 (1990) (plurality opinion) (Stevens, J.)) (alteration in original). The parties' agreement ends there. The parties dispute whether the law discriminates against the federal government and its contractors.

We hold that, at the very least, AB 32 discriminates against the federal government and thus violates intergovernmental immunity.

"A State violates [the discriminatory aspect of intergovernmental immunity] when it treats [the] state [] more favorably than [the] federal [government] and no 'significant differences between the two classes justify the differential treatment.'" *Dawson v. Steager*, 139 S. Ct. 698, 703 (2019) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 814–816 (1989)). A state must "treat those who deal with the [federal] Government as well as it treats those with whom it deals itself." *Phillips Chem. Co. v. Dumas Indep. Sch. Dist*., 361 U.S. 376, 385 (1960); *see also California*, 921 F.3d at 878.

The Supreme Court has held that discrimination exists where the net effects of a state law discriminate against the federal government. *See Washington v. United States*, 460 U.S. 536, 544–45 (1983). And under this net effects analysis, AB 32 discriminates against the federal government. Two facts are undisputed. One, AB 32 requires the federal government to close *all* its detention facilities, including its ICE facilities. Two, AB 32 will not

require California to close *any* of its private detention facilities until 2028.[11]

This discrimination occurs in two steps. First, § 9501 generally prohibits any person from operating a private detention facility. *See* Cal. Penal Code § 9501. But then a series of exemptions operate to permanently exempt some state detention facilities,[12] while providing a ten-year phase-out for private state prisons. *See id.* §§ 9502(a)–(b), (d), (f)–(g), 9503, 9505(b), 5003.1(e), (c). State prisons may "renew or extend" a private detention contract to comply with a court-ordered population cap until January 1, 2028. *Id.* § 5003.1(e); 5003.1(c).

AB 32 facially discriminates against the federal government. California created a blanket prohibition and then exempted large swaths of state contractors in line with its own preferences. Meanwhile, it provided no comparable exceptions for the federal government. Put differently, California is the *only* meaningfully "favored class" under AB 32. *Dawson*, 139 S. Ct. at 705. AB 32 thus discriminates

[11] At oral argument, counsel for California claimed that the state has now closed its private prisons. But that fact is beside the point. There is a difference between voluntary action and a legal mandate. AB 32 does not *require* California to close its prisons before 2028.

[12] A few exemptions are facially neutral. *See* Cal. Penal Code §§ 9502(c), (e), 9503, 9505(a). But even the facially neutral exemptions will often only practically apply to state entities. Additionally, under *Dawson*, the only sub-sections relevant to the analysis are those that discriminate, not those that are facially neutral. *Dawson*, 139 S. Ct. at 705.

against the federal government and violates the intergovernmental immunity doctrine.[13]

The district court incorrectly applied an exemption-by-exemption analysis to the discrimination analysis. To reach that conclusion, the district court adopted the reasoning in *United States v. Nye County, Nevada*, 178 F.3d 1080 (9th Cir. 1999). But that reliance was misplaced. *Nye County* merely reaffirmed the general principle that statutory schemes should be viewed as a whole, 178 F.3d at 1083–84, 1087, and specified that where "the statute contains a series of exemptions, some of which favor the federal government, others of which favor the state, most of which are unconcerned with the federal/state distinction," then the court focuses "on the individual exemption to determine whether each taken on its own terms discriminates." *Id.* at 1088.

Nye County does not apply here. Unlike in *Nye County*, here, AB 32, taken as a whole, discriminates against the federal government. Nor are there cross-cutting exemptions: none of the exemptions expressly benefit the federal government alone. And the great majority of the exemptions

[13] The dissent suggests there are significant differences between California and the United States that justify differential treatment. We disagree with the dissent's framing of the issue. The law as written allows only state prisons to "renew or extend" private detention contracts "to comply with the requirements of any court-ordered population cap." Cal. Penal Code § 5003.1(e). The text of the exemption is not limited to court orders existing at the time of enactment; it carves out an exemption for "any court-ordered population cap." *Id.* If federal detention facilities are one day subjected to such an order, they still would not qualify for § 5003.1(e)'s exemption. The exemption thus does not differentiate based on whether an entity is under a court-ordered population cap. It instead hinges on which governmental entity is operating the detention facility. *See Dawson*, 139 S. Ct. at 706.

are not even facially neutral but expressly benefit the state. As GEO rightly points out, "If the discrimination analysis focused on each statutory exception in isolation, a state could easily evade the intergovernmental-immunity doctrine."

The district court also erred in holding that § 5003.1 was relevant here. According to the district court, § 5003.1 benefits the federal government because it prevents California (and only California) from using out-of-state detention facilities. But § 5003.1 does not provide an exemption to the federal government. It merely provides another limitation on California. And California can partially avoid even this limitation by relying on § 5003.1(e), which exempts state prisons subject to a court-ordered population cap.[14]

* * * * *

Because we hold that AB 32 discriminates against the federal government, we need not reach whether it "directly regulates" the United States under the intergovernmental immunity doctrine. As the parties' briefing suggests, it appears unsettled whether a "legal incidence" test or a

[14] GEO also makes a separate argument that AB 32's limitations do not apply because the contract falls into California Penal Code Section 9505(a)'s exception, which specifies that AB 32's prohibition does not apply to a "private detention facility that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract, not to include any extensions made to or authorized by that contract." Without citing any precedent, GEO asserts that its contract options do not constitute "extensions" under Section 9505(a). But ICE may terminate its contract every five years, so it follows that each time ICE declines to terminate the contract it is extending that contract. Thus, the district court did not abuse its discretion in finding that GEO's contract does not fall under Section 9505(a)'s exemption.

"substantially interference" analysis applies. *See, e.g.*, *North Dakota*, 495 U.S. at 423, 451–52 (competing plurality opinions of Justice Stevens and Justice Brennan); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839–40 (9th Cir. 2014) (ruling that the state law "*regulate[d]* [the federal government's] cleanup activities *directly*" but also noting that the law "*interferes with the functions of the federal government*" (emphasis added)); *California*, 921 F.3d at 880 (citing cases in which the state law "directly or indirectly affected the operation of a federal program or contract").

IV. The Other Injunction Factors Favor Appellants.

In deciding whether to grant a preliminary injunction, courts consider the likelihood of success on the merits as the most important factor. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). The United States and GEO are likely to prevail on the merits, as detailed above. The remaining injunction factors also tip in their favor.[15]

[15] To be entitled to injunctive relief, the United States and GEO must also establish that, without that relief, they are likely to suffer irreparable harm and the balance of equities tip in their favor. *Winter*, 555 U.S. at 20. "If we were in doubt whether [the United States and GEO] satisfied the remaining requirements for injunctive relief, we would remand to allow the district court to assess the likelihood of irreparable injury and to balance the equities." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009). Because "it is clear that these requirements are satisfied," we complete the preliminary injunction analysis here. *See id.* at 1207–08 (assessing irreparable harm and balancing the equities even though the district court decision rested solely on a finding that a movant had not established a likelihood of success on the merits).

A. The United States suffers irreparable harm.

Constitutional injuries are irreparable harms. *See, e.g.*, *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011). Because AB 32 facially discriminates against the federal government, the United States suffers an irreparable harm.

California argues that this irreparable injury is not *immediately* occurring. Because of AB 32's safe harbor provision, California argues that the appellants cannot suffer an irreparable injury until 2024, the date of the contracts' first extension option. But that the injury will occur in the future is by itself irrelevant. A party "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Here, it is indisputable that the United States cannot extend its contracts with GEO and its other contractors in 2024.

B. Balance of equities and the public interest favor the United States.

"Finally, by establishing a likelihood that [AB 32] violates the U.S. Constitution, [Appellants] have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal.*, 757 F.3d at 1069.

CONCLUSION

We profess no opinion on the wisdom of California's law banning private detention centers or the policy implications of so-called "for-profit prisons." California can enact laws that it believes are best for its people. But California cannot

intrude into the realm of the federal government's exclusive powers to detain undocumented and other removable immigrants if the state law conflicts with federal law and violates the intergovernmental immunity doctrine. The district court's orders granting Appellees' motions to dismiss and for judgment on the pleadings and denying Appellants' motion for a preliminary injunction are **REVERSED.** The case is **REMANDED** for further proceedings consistent with this opinion.

MURGUIA, Circuit Judge, dissenting:

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). In this case, the United States and the GEO Group, Inc. ("GEO"), a company that operates private, for-profit detention centers, contend that they are entitled to a preliminary injunction preventing enforcement of California's Assembly Bill 32 ("AB 32"), which prohibits the operation of "private detention facilities" within the state. The district court granted the motion for a preliminary injunction in part and denied the motion in part. The majority concludes that this was an abuse of discretion. I disagree, and I respectfully dissent.

I. Background

This case concerns California's ability to regulate private detention facilities within its borders, which California contends is a matter of public health and safety. In response to reports of substandard conditions, inadequate medical

care, sexual assaults, and deaths in for-profit facilities,[1] the California legislature has taken steps to limit their operation within the state. California is not the only state to do so: Illinois, Nevada, New York, and Washington have all passed legislation limiting or preventing the operation of private prisons.[2]

California's efforts culminated in AB 32, which generally prevents the operation of private detention facilities in the state of California. AB 32 has three parts: Section 1 prevents the California Department of Corrections and Rehabilitation ("CDCR") from entering or renewing a

[1] According a 2016 report published by the U.S. Department of Justice's Office of the Inspector General, "contract prisons incurred more safety and security violations per capita than comparable [government-run] institutions" between 2011 and 2014. Dep't of Justice, Off. of Inspector Gen., Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons i, 3–4, 44 (Aug. 2016), https://oig.justice.gov/reports/2016/e1606.pdf; *see also* Dep't of Homeland Sec., Off. of Inspector Gen., ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards 7 (Jan. 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf (concluding that "ICE does not adequately hold detention facility contractors accountable for not meeting performance standards"). These health, safety, and security concerns are the focus of several of the amicus briefs in this case, which highlight various governmental reports, news stories, and firsthand accounts of the conditions in private prisons and immigration detention centers.

[2] *See* Rachel La Corte, *Washington State Governor OKs Bill Banning For-Profit Jails*, AP News (Apr. 14, 2021), https://apnews.com/article/legislature-prisons-washington-legislation-immigration-ceda36fec7dfc3a56c8fe8f7a66d3d76; Illinois Way Forward Act, S.B. 667, 102d Gen. Assemb. (Ill. 2021); A.B. 183, 2019 Leg., 80th Sess. (Nev. 2019); A.B. 4484B, 2007–2008 Leg., Reg. Sess. (N.Y. 2007); H.B. 1090, 67th Leg., Reg. Sess. (Wash. 2021).

contract with a "private, for-profit prison facility located in or outside of the state," with some exceptions, *see* Cal. Penal Code § 5003.1; Section 2 prohibits "a person" from operating "a private detention facility within the state," with various exceptions, *see id.* §§ 9501–9505; and Section 3 provides that AB 32's provisions are severable. *See* 2019 Cal. Legis. Serv. ch. 739 (A.B. 32). AB 32 also contains a "safe harbor" exempting any facility "that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract." Cal. Penal Code § 9505(a).

The United States and GEO sued to prevent the enforcement of AB 32 with respect to three groups of facilities in the state of California: Bureau of Prisons ("BOP") facilities, U.S. Marshals Service ("USMS") facilities, and Immigration and Customs Enforcement ("ICE") facilities. At the core of their respective complaints, the United States and GEO argue that the state of California has impermissibly interfered with federal operations. Specifically, they contend that AB 32 is preempted by federal law and that AB 32 violates intergovernmental immunity by directly regulating—or at least discriminating against—the federal government. The district court granted a preliminary injunction with respect to the USMS facilities but denied injunctive relief with respect to the BOP and ICE facilities.[3] Only the ICE facilities are at issue in this appeal.

[3] With respect to the USMS facilities, the district court concluded that AB 32 was preempted by a federal statute allowing the Attorney General to make payments "for . . . the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government *or contracts with private entities*." *See* 18 U.S.C. § 4013(a) (emphasis

II. Our Review Is "Limited and Deferential."

As the majority acknowledges, we are not tasked with determining whether AB 32 is good policy. Nor are we tasked with definitively resolving the United States's and GEO's claims that AB 32 is conflict-preempted and violates intergovernmental immunity. Instead, we are presented with the narrow question of whether the United States and GEO are entitled to temporarily prevent the enforcement of AB 32 with respect to ICE facilities while this litigation plays out in the district court. More specifically, we must determine whether the district court abused its discretion in concluding they are not.

To obtain a preliminary injunction, the United States and GEO must demonstrate that (1) they are likely to succeed on the merits of their conflict-preemption or intergovernmental-immunity claims, (2) they would suffer irreparable harm absent injunctive relief, and (3) the balance of equities and the public interest favor an injunction. *Winter*, 555 U.S. at 20; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (per curiam). "Our review is limited and deferential." *United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019) (quoting *Sw. Voter Registration Educ. Project v.*

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added). By contrast, the district court explained that there was no such "clear and manifest" congressional intent to preempt AB 32 with respect to the ICE facilities because there was no mention of private entities in the statutes governing immigration detention. As for the BOP facilities, the district court concluded that the United States's claims were not justiciable. The United States does not challenge this determination on appeal.

Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam)).

The district court acted within its discretion in denying a preliminary injunction because the United States and GEO are not likely to succeed on their conflict-preemption and intergovernmental-immunity claims. Accordingly, I part ways with the majority as to the de novo analysis of the conflict-preemption and intergovernmental-immunity claims.[4] But even if I could join in the majority's analysis on the merits—which I conclude, for the reasons set out below, is inconsistent with our case law—I cannot endorse the majority's choice to proceed with de novo review of the remaining preliminary-injunction factors,[5] which goes far

[4] I agree with the majority that the United States's and GEO's claims are justiciable. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (explaining that we may consider whether plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" in determining whether there is a constitutional "case or controversy" over which we can exercise jurisdiction) (citation omitted); Majority Op. 15. Nobody disputes that AB 32 will prevent GEO from operating its existing ICE facilities as "private detention facilities" in California *at some point*—the only question is when.

[5] The majority maintains that it is not engaging in de novo review "of the denial of a preliminary injunction." Majority Op. 13 n.1. But it is undisputed that the district court did not consider the harm to the plaintiffs absent a preliminary injunction as to the ICE facilities, nor the balance of the equities with respect to these ICE facilities. The majority undertakes this analysis in the first instance, which constitutes de novo review.

I also cannot agree that the United States and GEO so clearly have satisfied the requirements for a preliminary injunction as to negate the need to remand to the district court. *See* Majority Op. 39 n.15. The situation at bar is a far cry from *Klein v. City of San Clemente*—the case

beyond the "limited and deferential" abuse-of-discretion review our case law prescribes. *See id.* Therefore, I respectfully dissent with respect to the majority's ultimate preliminary-injunction analysis as well.

III. AB 32 Is Likely Not Conflict-Preempted.

Nothing in AB 32 prevents the federal government from apprehending and detaining noncitizens who are present in the country unlawfully. Yet the United States and GEO insist that they are likely to succeed on the merits of their challenge to AB 32 because AB 32 is preempted by federal immigration law. In accepting this argument, the majority adopts a narrow view of AB 32 that is not justified by the legislation's text and context nor our case law. I would apply the presumption against preemption and conclude that AB 32 is not conflict-preempted.

A. The presumption against preemption applies.

Our preemption inquiry is rooted in the Supremacy Clause, but it is also sensitive to principles of federalism, under which "both the National and State Governments have elements of sovereignty the other is bound to respect." *See*

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cited by the majority—where the parties seeking an injunction faced the loss of their First Amendment right to engage in time-sensitive political speech. *See id.* (citing 584 F.3d 1196, 1207–08 (9th Cir. 2009)). No such time-sensitive issue exists here. The likelihood of irreparable harm is particularly uncertain given that the contracts at issue do not expire for several years and may even continue past 2024. *See* discussion *infra* Section V. Unresolved issues, like the remaining length of the contracts, are precisely why the case should be remanded to the district court. *Cf. Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, 1307 (9th Cir. 2013) (citation omitted) (noting that the grant or denial of a preliminary injunction "is a matter committed to the discretion of the trial judge").

Arizona v. United States, 567 U.S. 387, 398 (2012). Accordingly, "when a state regulates in an area of historic state power," *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018), we presume that the resulting state law has not been preempted unless that was the "clear and manifest purpose of Congress," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). This is known as the presumption against preemption, and it holds true even if the state law "'touche[s] on' an area of significant federal presence," such as immigration. *Knox*, 907 F.3d at 1174 (quoting *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 n.5 (9th Cir. 2016)).

States' historic police powers include regulation of health and safety. *Wyeth*, 555 U.S. at 565 n.3; *Puente Arizona*, 821 F.3d at 1104. To that end, in *United States v. California*, we upheld a state law providing for inspections of federal immigration detention facilities against a preemption challenge, noting that the United States "d[id] not dispute that California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders." 921 F.3d at 885–86.

Citing *California*, the district court here determined that AB 32 regulated "conditions in detention facilities located in California." The district court took judicial notice of AB 32's legislative history, which supports the conclusion that the state law responds to concerns about the health and welfare of detainees within the state's borders.[6] The district

[6] This legislative history included committee analysis referring to the 2016 Department of Justice report documenting "higher rates of inmate-on-inmate and inmate-on-staff assaults, as well as higher rates of staff use of force," at private prisons. *See* Sen. Judiciary Comm., Bill Analysis of Assembly Bill 32, 2019–2020 Reg. Sess., at 7 (July 2, 2019); *see also* Review of the Federal Bureau of Prisons' Monitoring of

court concluded that AB 32 regulates health and safety, falls within California's historic police powers, and is entitled to the presumption against preemption.

This result is consistent with our case law. To be sure, AB 32 goes further than the state health-inspection regulations at issue in *California*. But the majority fails to explain why its narrow view of AB 32—as a regulation of "the federal government's detention of undocumented and other removable immigrants"—should prevail over the district court's broader view of AB 32 as regulating detainee health and safety. *See* Majority Op. 17. AB 32 says absolutely nothing about immigration, and it does not mention the federal government.[7] Therefore, there is no justification for treating AB 32 as a regulation of immigration rather than one of health and safety.

Moreover, we recently explained that "effects in the area of immigration" do not prevent us from applying the presumption against preemption. *Puente Arizona*, 821 F.3d at 1104. The majority slices and dices AB 32 in order to frame it as a regulation of immigration detention, but that is particularly odd considering the United States sought a preliminary injunction with respect to BOP and USMS facilities as well—and obtained an injunction as to the

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Contract Prisons, *supra* note 1, at 18. Like the district court, we may take judicial notice of legislative history. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

[7] On its face, AB 32's prohibitions on private detention apply to (1) "a person" operating a private detention facility, which is necessarily a private entity, and (2) state agency CDCR, which must phase out private prisons by the year 2028 and is prevented from renewing contracts with private detention facilities unless certain exceptions apply. Cal. Penal Code §§ 5003.1, 9501.

USMS facilities—in this very litigation. Although AB 32 applies to immigration detention facilities in California, it certainly does not apply *only* to immigration detention facilities. Rather, AB 32 applies to a variety of federal and state facilities, including the BOP and USMS facilities the district court considered earlier. The majority offers no support for its decision to focus narrowly on the *effect* of AB 32 on only one type of facility—ICE detention centers.[8]

At the end of the day, two concerns seem to animate the majority's conclusion that the presumption against preemption should not apply: the potential burden on the federal government if private companies may no longer operate detention facilities, and the nagging suspicion that California was targeting the federal government's immigration detention facilities with AB 32. Majority Op. 16–18. But neither of these concerns is relevant to the presumption against preemption.

Consider the majority's hypothetical "open space time" law as an illustration. The majority posits that if we accepted

[8] The majority suggests that the "language" of a state law is often "conclusive" in determining whether the law is an exercise of the state's historic police power, but that the context of the state law is also relevant and may be able to displace the plain text. Majority Op. 16. It is doubtful that this is the proper test, given that the case cited in support of this proposition appears to focus on the language of the *federal statute* as an indication of Congress's preemptive intent. *See City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1028–29 (9th Cir. 1998) (rejecting a plaintiff's reliance on legislative history of a federal statute, rather than "the language of the statute itself," in determining whether a state law was expressly preempted) (citation omitted). But in any event, the plain language of AB 32 is neutral and not targeted at immigration, and the context of its enactment suggests that California was concerned with the health and safety of detainees, which is a matter within its historic police powers.

California's argument that it was exercising its traditional police powers by enacting AB 32, we would also be required to allow the state of Colorado to mandate eight hours of fresh-air time at the federal "supermax" prison in that state. Majority Op. 18 n.2. Of course, such a regulation would very obviously relate to health and safety of prisoners, a matter of historic state concern. That would not mean, though, that the federal supermax prison—which is operated by the BOP—would be required to provide "the most dangerous terrorists and criminals" eight hours outdoors every day. The presumption against preemption can be overcome, as discussed below, by clear and manifest congressional intent to displace the state law. *See Wyeth*, 555 U.S. at 565. So, if BOP had its own conflicting regulations—for instance, providing that supermax inmates may only have one hour of "open space time"—then those regulations would likely apply. That is not the case with AB 32, because there is no specific federal statute or regulation that AB 32 directly contradicts.[9] What's more, any such state regulation falling directly on federal officials operating a federally owned facility would likely be subject to the limits of the intergovernmental-immunity doctrine, which is entirely separate from the conflict-preemption analysis.

Of course, it is understood that a state cannot simply assert that it is regulating "health and safety" in order to

[9] The majority asserts that Congress has granted the Secretary of Homeland Security authority to enter into contracts with private detention facilities. Majority Op. 9. But, as discussed in more detail below, the regulations and statutes the majority cites do not provide any express statement of Congress's intent for the Secretary to enter into such contracts. To be clear, Congress has never expressly spoken on this issue.

insulate any regulation from preemption. Majority Op. 17–18. But nobody meaningfully disputes that the health, safety, and welfare of detainees within a state is within the state's historic police powers. There is no support in our case law for narrowing our view of AB 32 to its potential effects in the immigration context. Therefore, as did the district court, I would apply the presumption against preemption.

B. Congress has not expressed "clear and manifest" intent to overcome the presumption.

But the presumption against preemption does not end our inquiry, since "a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 972 (9th Cir. 2017) (as amended) (concluding that Arizona's policy of denying drivers' licenses to DACA recipients was preempted). When the presumption applies, we must determine whether Congress expressed "clear and manifest" intent in federal immigration statutes to preempt AB 32. *Puente Arizona*, 821 F.3d at 1104. Because Congress has expressed no such clear and manifest intent, AB 32 is not conflict-preempted.

The United States and GEO rely on a handful of statutes and regulations to establish Congress's purportedly "clear and manifest" intent to preempt AB 32. Among these federal enactments are 8 U.S.C. § 1231(g)(1), which allows the Secretary of Homeland Security[10] to "arrange for

[10] Although § 1231(g) refers to the Attorney General, the statute predates the creation of the Department of Homeland Security. This authority now resides with the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

appropriate places of detention for aliens detained pending removal or a decision on removal," and 6 U.S.C. § 112(b)(2), which allows the Secretary to "make contracts, grants, and cooperative agreements." The district court concluded that this collection of immigration, criminal, and contract law did not "clearly and manifestly express[]" congressional intent to allow federal officials to enter into contracts for private immigration detention facilities. Therefore, the district court determined that AB 32's general prohibition on private detention facilities was not preempted with respect to the ICE facilities at issue here.

While I do not disagree with the majority's conclusion that the Secretary of Homeland Security *may* enter into contracts for private immigration detention, *see* Majority Op. 20–31, that is beside the point. Even if Congress has not *prevented* private immigration detention, Congress certainly has not *clearly authorized* such detention either. Whether the Secretary is *allowed* to enter into contracts is not dispositive—rather, our inquiry turns on whether Congress clearly spoke with respect to the private detention facilities covered by AB 32. At bottom, the collage of statutes and regulations allowing the Secretary to enter into contracts and other agreements for detention of noncitizens says nothing about private companies like GEO, so there is nothing expressing the sort of "clear and manifest" intent necessary to prevent the operation of AB 32's general prohibition on private detention.

To understand why Congress's general statement that the Secretary of Homeland Security may arrange for "appropriate places of detention," 8 U.S.C. § 1231(g)(1), is not enough to provide "clear and manifest" intent to preempt AB 32, consider the differences between the statutes governing ICE detention and USMS detention—both of

which were initially at issue in this case. The USMS statute provides:

> The Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds appropriated for Federal prisoner detention for . . . the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government *or contracts with private entities*.

18 U.S.C. § 4013(a) (emphasis added). Notably, the district court found this language particularly persuasive in concluding that AB 32 was conflict-preempted as to the *USMS* facilities, explaining that "Congress clearly authorized USMS to use private detention facilities in limited circumstances," and citing additional provisions of § 4013 that outline specific eligibility requirements for "a private entity" housing USMS detainees. *See* 18 U.S.C. § 4013(c)(2). By contrast, the immigration-detention statute does not mention "private entities" at all; it explains only that the Secretary may spend funds to "acquire, build, remodel, repair, and operate facilities." 8 U.S.C. § 1231(g)(1). Another section of the immigration statute, 8 U.S.C. § 1103(a)(11), authorizes federal payments for, among other things, "housing, care, and security of persons detained" by the Department of Homeland Security "under an agreement with a State or political subdivision of a State." Again, unlike the USMS statute, this provision does not expressly mention contracts with private entities. In the absence of a clear statement from Congress in the statutes relating to immigration detention, the district court did not err in

concluding that there was no "clear and manifest" intent that could overcome the presumption against preemption with respect to the ICE facilities.

The majority locates Congress's "clear and manifest" intent in general, permissive statutory language. *See, e.g.*, 8 U.S.C. § 1231(g)(1) (allowing Secretary to arrange for "appropriate places of detention"). According to the majority, AB 32 conflicts with Congress's intent to provide the Secretary with broad discretion in the field of immigration detention. Majority Op. 32. But our case law does not support the "conflict with discretion" rule that the majority sets out here. In each of the cases the majority discusses, federal law provided a separate and comprehensive scheme with which a state law interfered. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the federal statute provided a specific and "calibrated" scheme for imposing sanctions on the country then known as Burma, which included certain conditions and exemptions. *Id.* at 377–78 ("These detailed provisions show that Congress's calibrated Burma policy is a deliberate effort 'to steer a middle path.'") (citation omitted). Therefore, a state statute preventing entities from doing business with Burma impermissibly interfered with this scheme. *Id.* at 379. And in *Gartrell Construction Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991), there were separate but "similar" federal licensing requirements with which a state licensing requirement conflicted. *Id.* at 439; Majority Op. 32. Neither of these cases establishes a bright-line rule that interfering with the federal government's discretion is impermissible. Rather, these cases stand for the unsurprising principle that when there is a comprehensive federal scheme in place, there is no room for states to impose regulations that conflict with specific provisions of that scheme.

The Supreme Court has warned us that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that pre-empts state law.'" *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992)). The majority's reliance on AB 32's conflict with a federal official's "discretion," unfortunately, veers into the sort of far-reaching inquiry the Court cautioned against. In the specific context of immigration detention, it is far from clear whether Congress intended the Secretary of Homeland Security to enter into contracts with private detention facilities. In my view, that should resolve our preemption inquiry. And the fact that the majority spends approximately a quarter of its entire opinion simply establishing that the Secretary is not *prevented* from entering into such contracts in the first place, Majority Op. 20, suggests that Congress's intent is not so "clear and manifest" in this respect.

Therefore, I would uphold the district court's determination that the presumption against preemption has not been overcome by Congress's "clear and manifest" intent with respect to the ICE facilities at issue in this case. In other words, AB 32 is not preempted,[11] and the United

[11] Although the district court also addressed the possibility of field preemption and concluded that AB 32 was not preempted based on the federal government's occupation of the field of immigration detention, the United States and GEO do not specifically challenge this ruling on appeal. So, like the majority, I address only conflict preemption here. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (holding that issues raised without argument in an opening brief are abandoned on appeal).

States and GEO are not entitled to a preliminary injunction on this claim.

IV. AB 32 Likely Does Not Violate Intergovernmental Immunity.

By its terms, AB 32 applies only to the state department of corrections and private "person[s]." Cal. Penal Code §§ 5003.1, 9501. However, the United States and GEO insist that AB 32 violates the principles of intergovernmental immunity by directly regulating, or at least discriminating against, the federal government. The majority concludes that AB 32 discriminates against the federal government in favor of the state, and that we therefore need not decide whether AB 32 directly regulates the federal government. Again, I respectfully disagree.

A. AB 32 does not discriminate against the federal government.

The doctrine of intergovernmental immunity is also rooted in the Supremacy Clause. *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014). There are two types of intergovernmental-immunity challenges: A state law violates intergovernmental immunity if the state (1) directly regulates the federal government or (2) discriminates against the federal government "or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (Stevens, J.) (plurality opinion). Here, the district court rejected both the direct-regulation and the discrimination challenges. Following the majority's lead, I address the discrimination challenge first.

The "discrimination" type of intergovernmental immunity provides that a state regulation is unlawful when it "discriminate[s] against the federal government and

burden[s] it in some way." *California*, 921 F.3d at 880. "It is not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment." *Id.* at 881. "[A] state 'does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them.'" *Id.* (quoting *Washington v. United States*, 460 U.S. 536, 544–45 (1983)). But a state treating someone else better than the federal government does not amount to discrimination when "significant differences" exist that justify different treatment. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 816 (1989).

AB 32's prohibition on the operation of private detention facilities is facially neutral: "Except as otherwise provided in this title, a person shall not operate a private detention facility within the state." Cal. Penal Code § 9501. However, the United States and GEO contend that the exceptions to the statute effectively discriminate by treating the state's detention facilities better than their federal counterparts. They assert that the effect of AB 32's exceptions, many of which apply to facilities operating pursuant to certain state laws or licensing schemes, is to require the federal government to close all its facilities while requiring California to close none. This assertion is belied by the record, and in any event, misses a key nuance of our case law: The relevant inquiry is not only whether AB 32 treats federal facilities differently from state facilities, but also whether the different treatment is justified based on significant differences between the two types of facilities. *See Davis*, 489 U.S. at 816.

As the district court explained, each of the exceptions in AB 32 is justified by the characteristics of the facilities exempted. AB 32 enacts an across-the-board prohibition on

the operation of a "private detention facility," which is defined as "any facility in which persons are incarcerated or otherwise involuntarily confined for the purposes of execution of a punitive sentence imposed by a court or detention pending a trial, hearing, or other judicial or administrative proceeding." Cal. Penal Code §§ 9500(a), 9501. It then exempts certain types of facilities: juvenile rehabilitative centers, *id.* § 9502(a); civil-commitment facilities, *id.* § 9502(b); educational, vocational, and medical facilities, *id.* § 9502(c); residential care facilities, *id.* § 9502(d); school facilities, *id.* § 9502(e); and quarantine facilities, *id.* § 9502(f). Even if the term "private detention facilities" would encompass all these facilities, it is not difficult to see why the health and safety concerns animating AB 32 would not necessarily apply to these exempted facilities, many of which would already be subject to separate state licensing and health regulations. In other words, there are "significant differences" between these wide-ranging educational and rehabilitative facilities and the "private detention facilities" subject to AB 32's prohibitions. *See Davis*, 489 U.S. at 816. And several of these exemptions *may* be used by the federal government; facially, the exceptions for educational, vocational, medical, and school facilities are not limited to state-licensed entities. *See* Cal. Penal Code § 9502(c), (e); *cf. United States v. Nye County*, 178 F.3d 1080, 1088 (9th Cir. 1999) (explaining that a tax exemption for contractors who work with state universities was not discriminatory because there were no analogous federal institutions in the state).

The United States and GEO focus much of their argument on § 5003.1(e), which allows CDCR—and only CDCR—to renew or extend a contract with a "private, for-profit prison facility" to "comply with the requirements of any court-ordered population cap." California's state

prisons are currently subject to a court order requiring CDCR to "reduce its prison population to 137.5% of design capacity." *See Brown v. Plata*, 563 U.S. 493, 501–02 (2011); *Coleman v. Brown*, 952 F. Supp. 2d 901, 934 (E.D. Cal. 2013) (noting that ongoing monitoring of "design capacity ratio" is necessary). As the United States and GEO point out, this means that CDCR—unlike the federal government—may be allowed to renew contracts with private prisons despite AB 32. But again, this exemption only constitutes discrimination—and a violation of intergovernmental immunity—if there are no "significant differences" between the exempted state facilities and the federally affiliated facilities. *Davis*, 489 U.S. at 816. Here, as the district court recognized, there is a significant difference: CDCR is under a court-ordered population cap; ICE facilities are not.[12]

I agree in principle with the majority that the proper approach is to view AB 32 as a whole in determining whether it discriminates. *Nye County*, 178 F.3d at 1087–88 (explaining that we assess a challenged exemption "in light of the . . . statute as a whole"); *see North Dakota*, 495 U.S. at 438 (Stevens, J.) ("A state provision that appears to treat the Government differently on the most specific level of

[12] The federal government *is* subject to several court orders that touch on immigration detention and proceedings, but none relate to facility capacity or population size. *See Gonzalez v. Sessions*, 325 F.R.D. 616 (N.D. Cal. 2018) (requiring the government to provide a bond hearing to certain detainees after 180 days of detention); *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (requiring bond hearings and "qualified representatives" for certain immigration detainees); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (preventing federal government from pressuring Salvadoran nationals to accept voluntary departure).

analysis may, in its broader regulatory context, not be discriminatory."); Majority Op. 37. But it is not clear how that would change the result the district court reached here. Of course, the "significant differences" justifying particular exemptions are still relevant to our inquiry. And to the extent we are concerned with the "net result" of AB 32, *see Washington*, 460 U.S. at 538–39—what the majority calls "net effects"—it does seem clear that the result of AB 32 will be the closure of both state and federal private detention facilities that are not medical or educational in nature. Majority Op. 35. That is because it is undisputed that CDCR is currently operating well under the court-ordered population cap and is therefore subject to the broader prohibition on renewing or extending contracts for private detention. Cal. Dep't of Corr. & Rehab., Population Reports, https://www.cdcr.ca.gov/research/population-reports-2/ (last accessed Aug. 12, 2021) (reporting that CDCR was operating at 111.3% of design capacity as of August 11, 2021). This data is consistent with California's representations in its briefing and at oral argument that the population-cap exemption has not excused CDCR from closing any private facilities. The majority characterizes the reality on the ground as "beside the point," because it reads § 5003.1(e) to render compliance with AB 32 optional for the state. Majority Op. 36 n.11. However, § 5003.1(e) is not optional. It allows for extensions or renewals of CDCR's contracts with private prisons only "in order to comply with the requirements of any court-ordered population cap." Because CDCR continues to operate at a capacity well under the court-ordered population cap in *Brown v. Plata*, CDCR cannot currently refuse to close private facilities based on that population cap. What's more, nothing in AB 32 allows CDCR to enter into *new* contracts with private facilities once

it closes existing facilities—even if CDCR exceeds the court-ordered population cap in the future.[13]

Finally, the majority suggests that California could have provided more exemptions that benefit the federal government. Majority Op. 36–37. That may be, but nothing in our intergovernmental-immunity case law requires a state to provide exceptions that *favor* the federal government. And the lack of exceptions that treat the federal government better than someone else does not constitute discrimination.

In sum, the district court correctly determined that AB 32 does not discriminate against the federal government but instead effects a general prohibition on private detention facilities. Moreover, even if AB 32 discriminated through its use of exemptions that favored the state over the federal government, I would decline to adopt the majority's approach in enjoining AB 32's operation given the existence of AB 32's severability clause. If AB 32's exemptions are the problem, we could simply sever the problematic exemptions rather than enjoining AB 32 altogether. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014) (explaining that California law directs us to consider

[13] The majority suggests that because "[t]he text of the exemption is not limited to [court-ordered population caps] existing at the time of enactment, . . . if federal detention facilities are one day subject to such an order, they still would not qualify for § 5003.1(e)'s exemption." Majority Op. 37 n.13. But this is equally true for *any* facility placed under a future court-ordered population cap, not just federal detention facilities. If the current court-ordered population cap on the California system is lifted, AB 32's exemption would cease to apply to CDCR. Any remaining CDCR contracts would expire. And even if a new court-ordered cap were later instituted, the exemption would not allow CDCR to enter into new contracts. *See* Cal. Penal Code § 5003.1(e) (allowing only for extension or renewal of existing contracts).

the inclusion of a severability clause in state or local legislation, which establishes a presumption in favor of severance). Alternatively, as California argues, we could require the state to extend AB 32's exemptions—for example, the population-cap exemption—to the federal government. *Davis*, 489 U.S. at 818.

B. AB 32 does not directly regulate the federal government.

Because AB 32 does not discriminate against the federal government, the next question is whether AB 32 directly regulates the federal government, which could also violate intergovernmental immunity. AB 32 does not directly regulate the federal government either.

A direct regulation is one that "imposes [a] prohibition on the national government or its officers." *Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 270 (1943). To that end, we have explained that state laws or local ordinances that restrict the conduct of federal agents and employees like military recruiters, *see United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010), or subject federal property to state safety requirements, *see Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996), constitute direct regulation of the federal government.[14] The

[14] Relatedly, a state law violates intergovernmental immunity if it directly regulates an "instrumentality" of the federal government. *See United States v. New Mexico*, 455 U.S. 720, 732 (1982). GEO argues that its facilities are "federal instrumentalities" because their work is very closely related to federal government functions. This argument is not supported by our case law. A federal instrumentality is an entity "so assimilated by the Government as to become one of its constituent parts." *United States v. Boyd*, 378 U.S. 39, 47 (1964) (citation omitted). Federal contractors like GEO are not federal instrumentalities. *See id.* at 48

district court distilled this case law as establishing a "legal incidence" test for state regulations—a state or local regulation directly regulates the federal government if the "legal incidence" of the regulation falls on a federal entity.[15]

However, GEO proposes a novel "substantial interference" test for direct regulation, positing that "under the intergovernmental-immunity doctrine, generally applicable state laws are invalid if they *substantially interfere* with federal operations." Although the majority suggests that it is "unsettled" whether such a test applies in this case, Majority Op. 38–39, the case law does not support GEO's "substantial interference" test—which, notably, the United States does not ask us to apply.

GEO's proposed "substantial interference" test is ostensibly rooted in one of the two competing plurality opinions in *North Dakota v. United States*, 495 U.S. 423 (1990). In *North Dakota*, the Supreme Court upheld a state liquor-labeling regulation against the federal government's

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(contractors operating federal atomic energy plant were not instrumentalities); *New Mexico*, 455 U.S. at 740–41 (same).

[15] This legal-incidence test originated in the tax-immunity context and requires a court to determine "which entity or person bears the ultimate legal obligation to pay the tax to the taxing authority." *Confederated Tribes & Bands of Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1084 (9th Cir. 2011). If the legal incidence of a tax falls on the federal government, that tax violates intergovernmental immunity; if the tax falls on contractors that are "entities independent of the United States," the tax "cannot be viewed as a tax on the United States itself." *See New Mexico*, 455 U.S. at 738. We have long relied on the legal-incidence test in the context of state taxes that apply to federal contractors. *See, e.g.*, *United States v. Cal. State Bd. of Equalization*, 683 F.2d 316, 318 (9th Cir. 1982); *United States v. Nev. Tax Comm'n*, 439 F.2d 435, 439 (9th Cir. 1971).

intergovernmental-immunity (and preemption) challenges. Justice Stevens wrote the opinion for a four-Justice plurality, applying tax-immunity (legal incidence) principles to conclude that the North Dakota regulation did not violate intergovernmental immunity because it "operate[d] against" suppliers of liquor, not against the federal government. *Id.* at 436–37 (Stevens, J.). Justice Stevens's plurality opinion therefore supports the district court's conclusion that the legal-incidence test is applicable in the context of state regulations, not just state taxes.

Justice Brennan, writing for a separate four-Justice plurality, dissented in part. Justice Brennan explained:

> contrary to the plurality's view, the rule to be distilled from our prior cases is that those dealing with the Federal Government enjoy immunity from state control not only when a state law discriminates but also when a state law *actually and substantially interferes* with specific federal programs.

Id. at 451–52 (Brennan, J.). In GEO's view, this language created a new test for direct regulation. And although neither GEO nor the United States can identify any subsequent case explicitly referring to the "substantial interference" formulation, and I have found none, GEO insists that we implicitly adopted such a test in *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014). To be clear, we did not adopt a "substantial interference" test in *Boeing*. Instead, we articulated the longstanding rule that a "*federally owned facility* performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor." *Id.* at 839 (quoting *Goodyear Atomic Corp. v. Miller*, 483 U.S. 174, 181 (1988))

(emphasis added). In *Boeing*, the state had imposed certain environmental remediation requirements on a single radioactive cleanup site owned in part by the federal government. *Id.* at 834–35. We concluded that this constituted an impermissible direct regulation. That conclusion was consistent with our previous direct-regulation case law, which provides that a regulation that proscribes the behavior of federal officials or federal property is "direct" and violates intergovernmental immunity. *See City of Arcata*, 629 F.3d at 991; *Blackburn*, 100 F.3d at 1435.

Whether or not we characterize our direct-regulation test as "legal incidence," AB 32 clearly does not directly regulate the federal government. AB 32 does not prevent a federal actor from doing anything—its prohibition applies to private persons and to CDCR. It is incorrect and a stretch to characterize this as a "direct" regulation—the regulation only affects the federal government, if at all, *through* prohibitions on other, private actors. To the extent we are concerned with state laws that burden the federal government by regulating private parties, those concerns are more appropriately addressed by our preemption case law. *See California*, 921 F.3d at 879–80 (cautioning against stretching intergovernmental-immunity doctrine "beyond its defined scope").

Therefore, I would hold that the district court did not err in concluding that AB 32 does not violate intergovernmental immunity because AB 32 neither directly regulates nor discriminates against the federal government. And because the United States and GEO are not likely to succeed on the merits of this claim *or* their conflict-preemption claim, I would hold that the district court did not abuse its discretion

in denying a preliminary injunction with respect to the ICE facilities.[16]

V. The District Court Did Not Abuse Its Discretion.

Separate and apart from my disagreement with the majority's conclusions regarding the United States and GEO's likelihood of success on the merits, I am concerned with the majority's approach to our "limited and deferential" review of the district court's preliminary-injunction decision. *See California*, 921 F.3d at 877. We have explained that the grant or denial of a preliminary injunction "is a matter committed to the discretion of the trial judge," and even a plaintiff with an "overwhelming likelihood of success on the merits" may not be entitled to a preliminary injunction. *See Evans*, 736 F.3d at 1307 (citation omitted). To that end, where the district court has not yet considered all the relevant preliminary-injunction factors, we have remanded for the district court to consider these factors in the first instance. *Id.*; *see also Arc of Cal. v. Douglas*, 757 F.3d 975, 992 (9th Cir. 2014). Regrettably, the majority declines to do so here.

After concluding that the United States and GEO are likely to succeed on the merits of their conflict-preemption and intergovernmental-immunity (discrimination) claims, the majority proceeds to determine in the first instance that the remaining preliminary-injunction factors tip in favor of the plaintiffs. Majority Op. 40. The majority concludes that the United States will suffer irreparable harm absent a preliminary injunction because AB 32 will inflict a constitutional injury. Majority Op. 40. But everyone agrees

[16] The district court similarly did not abuse its discretion in denying a permanent injunction based on these claims.

that all of ICE's existing detention facilities—several of which are operated by GEO—may continue to operate in California until at least 2024, at which point the government has the option to terminate the contracts. Majority Op. 12; *see* Cal. Penal Code § 9505(a) (exempting a "private detention facility that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of the contract, not to include any extensions").[17] And the federal government has recently indicated its intent not to renew "contracts with privately operated criminal detention facilities." *See* Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, 2021 WL 254321 (Jan. 26, 2021).

Given this uncertain record, I see no reason to conclude that the United States and GEO are entitled to the extraordinary remedy of a preliminary injunction while their challenge to AB 32 plays out in the district court. Perhaps, as the district court concluded with respect to the USMS facilities, the United States may need to take steps now to plan for the transfer of ICE detainees in California. But the USMS contracts expire in 2021, several years before the ICE contracts do, and it is far from clear that the same irreparable-harm analysis would apply to the ICE facilities. In any event, the district court, not our panel, is in the best position to assess these practical realities in the first instance. *See Evans*, 736 F.3d at 1307.

[17] Given the continued uncertainty and limited briefing with respect to whether the contract options constitute "extensions" or part of "the duration of the contract," I would conclude that GEO has not carried its burden to demonstrate that it is entitled to a preliminary injunction based on this "temporary safe harbor" provision.

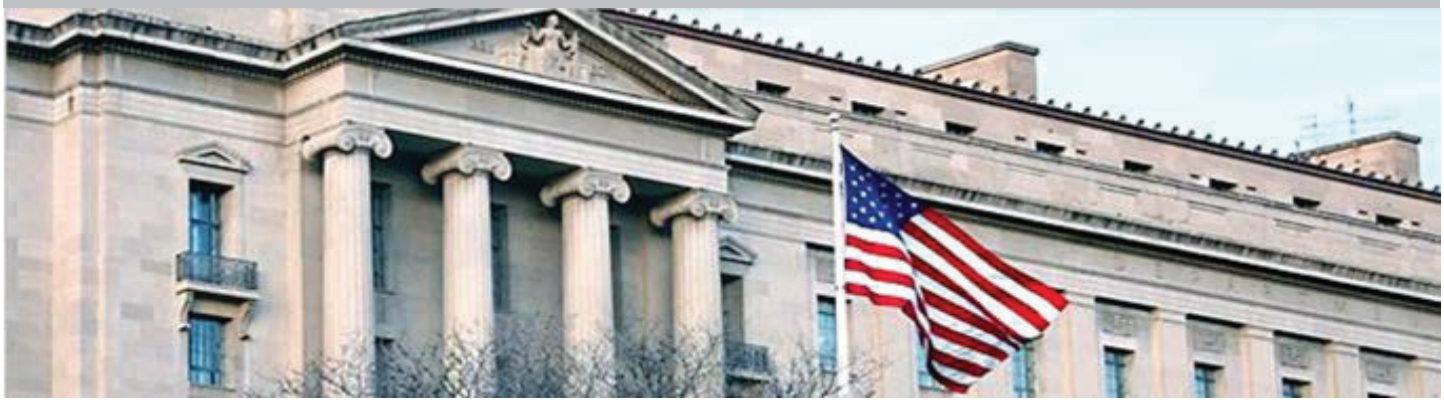
VI. Conclusion

I cannot conclude that the district court abused its discretion in denying the United States's and GEO's request for a preliminary injunction in part. The district court did not err in determining that California's AB 32, which prohibits the operation of private detention centers to protect detainees within the state's borders, is entitled to the presumption against preemption as a regulation of health and safety within the state's historic police powers, and that Congress did not express any "clear and manifest" intent to overcome that presumption with respect to the ICE facilities at issue in this case. The district court carefully distinguished between the statute governing USMS detention, which explicitly refers to "contracts with private entities," *see* 18 U.S.C. § 4013(a)(3), and the collection of statutes governing immigration detention, which makes no reference to private entities. The court did not err in concluding that Congress's intent was clear as to the USMS facilities, but not as to the ICE facilities.

Nor did the district court err in determining that AB 32, a law that applies only to the state department of corrections and private parties, neither directly regulates nor discriminates against the federal government in violation of intergovernmental immunity. At the end of the day, AB 32 enacts a prohibition on "a person" operating a "private detention facility"; it does not prohibit the federal government from doing anything. And AB 32's exemptions are permissible because they reflect significant differences between the exempted facilities and the ICE facilities that operate pursuant to contracts with private, for-profit companies. Therefore, I would affirm the district court's denial of a preliminary injunction with respect to the ICE facilities.

But even if I could agree with the majority that the district court erred as to the merits, the majority goes too far in concluding that the district court abused its discretion in denying a preliminary injunction. The district court's analysis granting a preliminary injunction in part and denying it in part was thorough, thoughtful, and well-reasoned. But because of its conclusion that the United States and GEO were not likely to succeed on the merits of their claims related to immigration-detention facilities, the district court did not have the opportunity to address the irreparable harm, balance of equities, and the public interest in an injunction preventing enforcement of AB 32 with respect to ICE facilities in California. We should not take it upon ourselves to balance these equities in the first instance. *See Evans*, 736 F.3d at 1307. I respectfully dissent.

Office of the Inspector General
U.S. Department of Justice



Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons

EXECUTIVE SUMMARY*

Introduction

The Federal Bureau of Prisons (BOP), which is the component of the Department of Justice (Department) responsible for incarcerating all federal defendants sentenced to prison, was operating at 20 percent over its rated capacity as of December 2015. To help alleviate overcrowding and respond to congressional mandates, in 1997 the BOP had begun contracting with privately operated institutions (often referred to as "contract prisons"), at first on a smaller scale and later more extensively, to confine federal inmates who are primarily low security, criminal alien adult males with 90 months or less remaining to serve on their sentences. As of December 2015, contract prisons housed roughly 22,660 of these federal inmates, or about 12 percent of the BOP's total inmate population. These contract prisons were operated by three private corporations: Corrections Corporation of America; GEO Group, Inc.; and Management and Training Corporation.[1] The BOP's annual expenditures on contract prisons increased from approximately $562 million in fiscal year (FY) 2011 to $639 million in FY 2014. In recent years, disturbances in several federal contract prisons resulted in extensive property damage, bodily injury, and the death of a Correctional Officer.

The Office of the Inspector General (OIG) initiated this review to examine how the BOP monitors these facilities. We also assessed whether contractor performance meets certain inmate safety and security requirements and analyzed how contract prisons and similar BOP institutions compare with regard to inmate safety and security data. We found that, in most key areas, contract prisons incurred more safety and security incidents per capita than comparable BOP institutions and that the BOP needs to improve how it monitors contract prisons in several areas. Throughout this report, we note several important corrective actions the BOP has taken, in response to findings and recommendations in our April 2015 audit of the Reeves County contract prison, to improve its monitoring of contract prisons, including in the areas of health and correctional services.[2]

The BOP's administration, monitoring, and oversight of contract prisons is conducted through three branches at BOP headquarters and on site. According to the BOP, at each contract prison, two BOP onsite monitors and a BOP Contracting Officer, in cooperation with other BOP subject matter experts, oversee each contractor's compliance with 29 vital functions within 8 operational areas, including correctional programs, correctional services, and health services. The BOP

* Redactions were made to the full version of this report for privacy reasons. The redactions are contained only in Appendix 9, the contractors' responses, and are of individuals' names or information that would enable an individual to be identified.

[1] In January 2007, the BOP awarded a contract to Reeves County, Texas, to operate the Reeves County Detention Center compounds R1 and R2 (RCDC I/II). Reeves County subcontracted operation of RCDC I/II to the GEO Group, Inc.

[2] See Department of Justice OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas, to Operate the Reeves County Detention Center I/II, Pecos, Texas*, Audit Report 15-15 (April 2015), iii.

monitors contractor performance through various methods and tools that include monitoring checklists, monitoring logs, written evaluations, performance meetings, and regular audits.

Results in Brief

We found that in a majority of the categories we examined, contract prisons incurred more safety and security incidents per capita than comparable BOP institutions. We analyzed data from the 14 contract prisons that were operational during the period of our review and from a select group of 14 BOP institutions with comparable inmate populations to evaluate how the contract prisons performed relative to the selected BOP institutions. Our analysis included data from FYs 2011 through 2014 in eight key categories: (1) contraband, (2) reports of incidents, (3) lockdowns, (4) inmate discipline, (5) telephone monitoring, (6) selected grievances, (7) urinalysis drug testing, and (8) sexual misconduct.[3] With the exception of fewer incidents of positive drug tests and sexual misconduct, the contract prisons had more incidents per capita than the BOP institutions in all of the other categories of data we examined. For example, the contract prisons confiscated eight times as many contraband cell phones annually on average as the BOP institutions. Contract prisons also had higher rates of assaults, both by inmates on other inmates and by inmates on staff. We note that we were unable to evaluate all of the factors that contributed to the underlying data, including the effect of inmate demographics and facility locations, as the BOP noted in response to a working draft of this report. However, consistent with our recommendation, we believe that the BOP needs to examine the reasons behind our findings more thoroughly and identify corrective actions, if necessary.

The three contract prisons we visited were all cited by the BOP for one or more safety and security deficiencies, including administrative infractions such as improper storage of use-of-force video footage, as well as more serious or systemic deficiencies such as failure to initiate discipline in over 50 percent of incidents reviewed by onsite monitors over a 6-month period. The contractors corrected the safety and security deficiencies that the BOP had identified. As a result, the BOP determined that each prison was sufficiently compliant with the safety and security aspects of its contract to continue with the contract during the period covered by our review. However, we concluded that the BOP still must improve its oversight of contract prisons to ensure that federal inmates' rights and needs are not placed at risk when they are housed in contract prisons.

Our site visits also revealed that two of the three contract prisons we visited were improperly housing new inmates in Special Housing Units (SHU), which are normally used for disciplinary or administrative segregation, until beds became available in general population housing. These new inmates had not engaged in

[3] We selected these categories of data to analyze as potential safety and security indicators because they provided information on areas addressed by American Correctional Association standards on security and control, inmate rules and discipline, and inmate rights, and because these data were tracked by both the contract prisons and the BOP institutions. See Appendix 1 for more information on our methodology, including our data analysis.

any of the behaviors cited in American Correctional Association standards and BOP policies that would justify being placed in such administrative or disciplinary segregation. When the OIG discovered this practice during the course of our fieldwork, we brought it to the attention of the BOP Director, who immediately directed that these inmates be removed from the SHUs and returned to the general population. The BOP Director also mandated that the contracts for all contract prisons be modified to prohibit SHU placement for inmates unless there is a policy-based reason to house them there. Since that time, the BOP informed us that the practice of housing new inmates in the SHU is no longer occurring in the contract prisons and that the BOP has not identified any further non-compliance to date regarding this issue.

Finally, we found that the BOP needs to improve the way it monitors contract prisons. We focused our analysis on the BOP's Large Secure Adult Contract Oversight Checklist (checklist) because, as described by BOP operating procedures, it is an important element of the BOP's Quality Assurance Plan, as well as a mechanism BOP onsite monitors use to document contract compliance on a daily basis. We believe onsite monitors are best positioned to provide the BOP's quickest and most direct responses to contract compliance issues as they arise. We found that the checklist does not address certain important BOP policy and contract requirements in the areas of health and correctional services. As a result, the BOP cannot as effectively ensure that contract prisons comply with contract requirements and BOP policies in these areas and that inmates in contract prisons receive appropriate health and correctional services.

For health services, the checklist does not include observation steps to verify that inmates receive certain basic medical services. For example, the observation steps do not include checks on whether inmates received initial examinations, immunizations, and tuberculosis tests, as BOP policy requires. We also found that monitoring of healthcare for contract compliance lacks coordination from BOP staff responsible for health services oversight.

For correctional services, the checklist does not include observation steps to ensure searches of certain areas of the prison, such as inmate housing units or recreation, work, and medical areas, or for validating actual Correctional Officer staffing levels and the daily Correctional Officer duty rosters.

Recommendations

We make four recommendations to the BOP to improve the monitoring and oversight of its contract prisons, including enhancing its oversight checklist, which we believe should assist the BOP in ensuring that the significant number of inmates it houses in these facilities receive appropriate health and correctional services and that the contract prisons are safe and secure places to house federal inmates.[4]

[4] After incorporating the BOP's formal comments into this report, the OIG also provided a copy of the final report to each contractor. The OIG has reviewed the contractors' responses, which are attached as Appendix 9. The analysis in our report is based on information BOP has provided, and the OIG has determined that the contractors' responses do not affect our analysis or the conclusions reached in this report.

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INTRODUCTION

The mission of the Federal Bureau of Prisons (BOP) is to protect society by confining federal offenders in correctional facilities that are safe, humane, cost-efficient, and secure, and to provide reentry programming for the inmates to ensure their successful return to the community. Since the early 1980s, there has been an unprecedented increase in the federal inmate population — from approximately 25,000 in fiscal year (FY) 1980 to nearly 219,000 in FY 2012. According to a 2013 congressional report, since 1980 the federal inmate population has increased, on average, by 6,100 inmates each year.[5] However, since FY 2013, when the BOP inmate population reached its peak of 219,298, the population has been declining — to 197,645 in December 2015, a decrease of 21,653 inmates (or approximately 10 percent) over that 2-year period. In spite of this downward trend, the BOP currently operates at about 20 percent over its rated capacity, and costs spent on the federal prison system are predicted to continue to rise.[6]

To help alleviate overcrowding in BOP institutions and respond to congressional mandates, in 1997 the BOP began contracting with privately operated institutions (often referred to as "contract prisons"), at first on a smaller scale and later more extensively, to confine inmates who are primarily low security, criminal alien adult males.[7] Many of the inmates incarcerated in these contract prisons are Mexican nationals with convictions for immigration offenses who have 90 months or less remaining to serve on their sentences.[8] As of December 2015, contract prisons housed roughly 22,660 of these federal inmates, or approximately 12 percent of the BOP's total inmate population. These prisons were operated by three private corporations: Corrections Corporation of America (CCA); the GEO Group, Inc. (GEO); and Management and Training Corporation (MTC).

[5] Nathan James, *The Federal Prison Population Buildup: Options for Congress*, R42937 (Washington D.C.: Congressional Research Service, January 22, 2013) (accessed July 28, 2016).

[6] U.S. Department of Justice (DOJ), Fiscal Year 2016 Budget Summary (accessed July 28, 2016).

[7] Two congressional actions precipitated the BOP's use of contract prisons to house low security inmates. The *National Capital Revitalization Act of 1997* mandated that the BOP designate District of Columbia sentenced felons to correctional facilities operated or contracted for the BOP. Congress also recommended that the BOP operate the Taft Correctional Institution as a private facility. Since that time, the BOP has developed large scale contracts with the private sector to confine specialized populations.

[8] The BOP refers to this as a Criminal Alien Requirement when soliciting for bids that require contract prisons to house this specific type of inmate population. There are exceptions to the Criminal Alien Requirement for three facilities: (1) the Rivers Correctional Institution also houses low security adult males from Washington, D.C.; (2) the Taft Satellite Camp houses minimum security adult males who are U.S. citizens; and (3) the now-closed Willacy County Correctional Center housed criminal alien adult males serving sentences of 3 months or less.

Background

In recent years, disturbances in several contract prisons have resulted in extensive property damage, bodily injury, and the death of a Correctional Officer. Examples include:

- In December 2008 and January 2009, the Reeves County Detention Center had a riot on its Compound III and Compounds I and II, respectively.[9] A 2015 Office of the Inspector General (OIG) audit of the Reeves Detention Center Compounds I and II cited a BOP After-Action Report from the 2009 riot: "While low staffing levels alone were not the direct cause of the disturbances, they directly affected Security and Health Services functions."[10]

- In February 2011, inmates at the Big Springs Correctional Center physically assaulted prison staff. The contractor reported that the inmates were dissatisfied with the staff's response to a medical emergency on the compound that resulted in the death of an inmate.

- In May 2012, a Correctional Officer was killed and 20 people were injured during a riot at the Adams County Correctional Center. The disturbance involved approximately 250 inmates who, according to contemporaneous media reports, were angry about low-quality food and medical care, as well as about Correctional Officers the inmates believed were disrespectful.

- In February 2015, at the Wilacy County Correctional Center, inmates set fires and caused extensive damage to the prison. As a result of the damage to the prison and the BOP's determination that the contractor could no longer perform the required services, the BOP terminated its contract for this facility.

In April 2015, the OIG issued an audit of the Reeves County Detention Center Compounds I and II, which house over 2,400 federal inmates.[11] The OIG found that the contractor had failed to comply with contractual requirements in the areas of billing and payment, correctional and health services staffing, and internal quality control. The audit identified almost $3 million in costs that were either unallowable or unsupported or funds that should be put to better use. Also, we found that from the start of the contract in January 2007 to March 2009, there were no minimum staffing requirements for the institution because the BOP had sought to reduce costs. After an inmate riot in 2009, the BOP established the minimum

[9] The Reeves County Detention Center is located in Reeves County, Texas, and has three compounds that house inmates for the BOP. Compounds I and II are one facility consisting of multiple housing units within a secure perimeter. Compound III is a separate facility.

[10] DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas, to Operate the Reeves County Detention Center I/II, Pecos, Texas,* Audit Report 15-15 (April 2015), iii.

[11] DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007.*

Correctional Officer staffing requirement in the contract. Nevertheless, the OIG's 2015 audit also found that the institution had significant issues meeting its minimum staffing requirement in health services. Additionally, the audit identified areas that needed improvement relating to internal quality control, such as fully documenting monitoring activities and tracking corrective action plans for significant deficiencies.

The OIG also found that contract prison officials at Reeves County had converted a general population housing unit into a "modified monitoring unit" that was being used to isolate and restrict movement of inmates whose behavior they believed was jeopardizing the safety of staff and other inmates. A review of the modified monitoring unit showed that there was a lack of specific policies and procedures to address inmate placement in and release from this unit, as well as its operation, and to ensure inmate due process and other rights were preserved.

In response to the aforementioned findings from the 2015 OIG audit report, the BOP took the following actions at the Reeves County facility: (1) reviewed its contract costs to identify and remedy those costs that were either unallowable or unsupported, (2) updated the BOP's oversight checklist for all the contract prisons and trained onsite monitors on how to use that tool to properly document monitoring activities, (3) issued guidance to the Reeves County contractor staff instructing them to create a corrective action plan for each significant deficiency identified during internal audits, and (4) developed new operational procedures for the modified monitoring unit at Reeves. Based on actions the BOP had taken, the OIG closed the recommendations made in its 2015 audit report.

The OIG initiated this review in order to examine how the BOP monitored its contract prisons during FY 2011 through FY 2014. In that context, we also assessed the contractors' compliance with the terms of the contract in selected areas of inmate safety and security. Finally, we analyzed data from the 14 contract prisons that were operational during the period of our review and a select group of 14 BOP institutions with comparable inmate populations to evaluate how the contract prisons performed relative to the selected BOP institutions in key areas. Our fieldwork, from April 2014 through February 2015, included interviews, data collection and analysis, and document review. We interviewed BOP officials, including Central Office administrators and staff responsible for oversight and management of contract prisons. We conducted site visits to three contract prisons: the Giles W. Dalby Correctional Facility and the Eden Detention Center in Texas and the Rivers Correctional Institution in North Carolina. During each site visit, we interviewed BOP onsite monitors, contract staff, and inmates. We also toured the sites, observed staff and inmate activities, attended staff meetings, and reviewed logs and records. Appendix 1 has a detailed description of the methodology of our review.

In this section, we discuss contract prisons that incarcerate federal inmates designated to the custody of the BOP. We then discuss the contract requirements, followed by the BOP's current structure and process for monitoring and oversight of the contract prisons.

Contract Prisons

At the time of our review, three private corporations, CCA, GEO, and MTC, operated 14 BOP contract prisons. Collectively, these contract prisons provided approximately 27,000 beds for federal inmates.[12] Figure 1 below shows the location and population of the BOP's contract prisons managed by each contractor as of December 2014.

[12] Our analysis includes data from the 14 contract prisons that were operational from FY 2011 through FY 2014. In March 2015, the BOP terminated its contract with the Willacy County Correctional Center in Texas following the February 2015 riot. The contract for the Northeast Ohio Correctional Center expired on May 31, 2015, with no option to renew. In December 2014, the BOP entered into a new contract with GEO to operate the Great Plains Correctional Facility in Oklahoma. Operations at this contract prison began in June 2015.

Figure 1

Location and Population of BOP Contract Prisons[13]

Private Contract Prisons	
1. Adams County, Mississippi	CCA
2. Big Springs, Texas	GEO
3. Cibola, New Mexico	CCA
4. D. Ray James, Georgia	GEO
5. Dalby, Texas	MTC
6. Eden, Texas	CCA
7. McRae, Georgia	CCA
8. Moshannon Valley, Pennsylvania	GEO
9. Northeast Ohio, Ohio	CCA
10. Reeves Correction Institution, Texas	GEO
11. Reeves Detention Center, Texas	GEO
12. Rivers, North Carolina	GEO
13. Taft, California	MTC
14. Willacy, Texas	MTC

Source: BOP

[13] Figure 1 reflects the contract prisons and their population at the time of our fieldwork. In January 2007, the BOP awarded a contract to Reeves County, Texas, to operate the Reeves County Detention Center compounds R1 and R2 (RCDC I/II). Reeves County subcontracted operation of RCDC I/II to the GEO Group, Inc. Figure 1 reflects the combined population for these two facilities that are operated under two separate contracts.

Contract Requirements

The BOP's contracting process is governed by the Federal Acquisition Regulations (FAR) and the Justice Acquisition Regulations. The BOP's acquisition policy supplements the FAR and the Justice Acquisition Regulations and provides uniform acquisition procedures.[14] Contractors must comply with all applicable federal, state, and local laws and regulations, as well as all applicable executive orders, case laws, and court orders. In addition, contractors must follow a number of BOP policies and requirements as defined in their contracts.[15] One specific requirement applicable to all contract prisons is obtaining and maintaining accreditation from the American Correctional Association (ACA) and the Joint Commission on Accreditation of Healthcare Organizations.[16] Contractors also must meet 29 functions that the BOP has identified as vital to contract performance (see Appendix 2). The vital functions can range from creating an adequate security inspection system to providing nutritionally adequate meals and ensuring inmates have access to healthcare. The 29 vital functions fall under 8 operational areas, each of which is assigned a percentage that correlates with contractor performance:

1. Administration (10 percent),
2. Correctional Programs (10 percent),
3. Correctional Services (20 percent),
4. Food Service (15 percent),
5. Health Services (15 percent),
6. Human Resources (10 percent),
7. Inmate Services (15 percent), and
8. Safety and Environmental Health (5 percent).

A contract prison may receive a monetary deduction for less than satisfactory performance in any one of these areas.[17] The BOP determines the number of vital functions that were unsatisfactory under each operational area and then calculates a deduction amount based on the percentages assigned to each operational area. The BOP and the contractors have quality control mechanisms to ensure that these

[14] BOP Program Statement 4100.04, Bureau of Prisons Acquisition Policy (May 19, 2004).

[15] Such BOP polices include those on the use of force and inmate discipline. The contractors are permitted to develop their own policies in certain areas, such as the operation of Special Housing Units and healthcare, based on ACA and other standards. The contract contains administrative and program requirements, including all services, activities, deliverables, and the timelines for specified work throughout the life of the contract.

[16] The ACA is a private, nonprofit organization that administers a national accreditation program for all components of adult and juvenile corrections. The Joint Commission on Accreditation of Healthcare Organizations accredits and certifies healthcare organizations and programs in the United States. Joint Commission accreditation certifies that an organization meets certain healthcare performance standards.

[17] The BOP may also award a contractor an annual award fee based on exceptional performance. However, the award fees were removed from contract prison solicitations in June 2010. All contracts awarded after that date do not include an award fee. During the time of this review, 12 of the 14 contract prison contracts still contained the award fee provision.

vital functions are carried out in accordance with the contract. The contractors' quality control is known as the quality control program, and the BOP's is known as the Quality Assurance Plan (QAP). We describe each of these internal controls below.

Quality Control and Quality Assurance

BOP contracts place the responsibility for quality control on the contractor rather than on the BOP. Each contractor must maintain a quality control program with audit tools that incorporate, among other government requirements, the 29 vital functions in the 8 operational areas described above and detailed in Appendix 2. The audit tools define the contractor's work, which is evaluated during required internal inspections. The tools specify the documents to examine, sampling techniques, span of time for review, processes to observe, persons to interview, and desired outcomes. A Quality Assurance Specialist and a trained team of contract staff conduct audits monthly or every other month based on their prison's specific audit tools.[18] The contractor provides the audit results to its corporate headquarters and the BOP. Each contractor's corporate headquarters conducts an annual audit of its prisons and provides the results to the BOP. If the contractor identifies a deficiency, which generally is considered to be a deviation from the contract, a weakness in internal controls, or an instance of nonconformance with an ACA standard affecting the quality of service provided, the contract staff generates a corrective action plan to monitor and resolve areas of nonconformance.[19] Onsite monitors and contract staff oversee the implementation of corrective actions until deficiencies are resolved. When a deficiency is serious enough to affect the quality of service, the onsite monitors may suggest a nonrecurring deduction in the monthly contract payment. We discuss deficiencies and the role of BOP onsite monitors below.

The BOP's QAP is based on contract requirements as defined in the FAR.[20] The QAP includes oversight monitoring checklists, Contract Facility Monitoring (CFM) review guidelines, and the contractor's quality control plan. We discuss these aspects of the BOP's QAP below.

[18] The Quality Assurance Specialist manages the contract prison's internal audits, reviews the results of the audits, and assists prison staff with implementing a corrective action plan for any deficiencies as discussed below.

[19] A corrective action plan is the contract prison's written plan for correcting identified deficiencies and is submitted to the BOP within 30 days after receipt of the final CFM report or other notice of deficiency.

[20] The BOP's October 14, 2015, Privitizaton Management Branch Operation Procedures state: "The contract facility QAP, oversight monitoring checklists, and random samplings of the contractor's performance, as well as their quality control program, are examples of the Bureau's QAP efforts." The BOP's QAP also includes a formal annual audit of contractor performance by the Contract Facility Monitoring team, but this annual audit does not fulfill the same function of documenting day-to-day monitoring activities between audits. We discuss these BOP efforts in more detail below.

Contract Monitoring and Oversight

The BOP's administration, monitoring, and oversight of its 14 contract prisons is shared by three branches: the Privatization Management Branch (PMB) of the Correctional Programs Division; the CFM Branch of the Program Review Division; and the Privatized Corrections Contracting Section within the Acquisitions Branch of the Administration Division. These three branches work in different ways to ensure contract compliance and consistency in the monitoring and oversight of the contract prisons' operations. The PMB is responsible for general oversight of the contract prisons, the CFM Branch provides subject matter expertise in the form of operational reviews, and the Privatized Corrections Contracting Section provides contractual oversight. We discuss in more detail the role of each below.

Privatization Management Branch

In December 2001, the BOP created the PMB to monitor and oversee the operations of the BOP's contract prisons. A Branch Administrator oversees two sections, Field Operations and Support and Development, each led by an Assistant Administrator. The Assistant Administrator for Field Operations coordinates all field operations and manages field resources. Within Field Operations, three regional Privatization Field Administrators (PFA), two onsite monitors at each contract prison, and five discipline-specific specialists at BOP headquarters provide operational support to the PMB field staff and contract prison staff. The PMB field staffs (PFAs and onsite monitors) are responsible for oversight and liaison activities on their respective contracts to ensure contract compliance. The Assistant Administrator of Support and Development leads a team of Program Specialists and Management Analysts who provide administrative support to the field staff. The field staff uses a number of monitoring tools to directly oversee the contract prisons. We discuss the PMB's field staff and monitoring tools below.

- **Privatization Field Administrators.** PFAs provide contract management and oversight for three to five contract prisons, supervise the two onsite monitors at each prison, review all oversight work and documents, and ensure consistency among the contracts.

- **Onsite Monitors.** Each contract prison has a Senior Secure Institution Manager (SSIM) and a Secure Oversight Monitor (SOM). The SSIM, under the direction of a PFA, has primary responsibility for ensuring contract compliance onsite and provides administrative direction in accordance with the FAR. The SSIM also ensures population levels are within the contract requirements, gathers information and formulates reports for the BOP's Central Office, and assists the SOM with onsite monitoring. The SOM, under the direction of the SSIM, oversees the contract prisons' operations, mainly through daily observations and liaison with prison staff.

  The SSIM and SOM conduct routine inspections and daily reviews of the eight operational areas in all departments of their assigned contract prison. The PMB operating procedures require the SSIM and the SOM to monitor the

contractor's performance through various methods and tools, including monitoring checklists, monitoring logs, written evaluations, and performance meetings.

- *Large Secure Adult Contract Oversight Checklist (checklist).* The checklist contains approximately 70 observation steps, relating to the 8 operational areas, which the onsite monitors must observe and document every month.[21] Onsite monitors at each contract prison document their observations on the checklist and rate each operational area as "compliant" or "non-compliant." The appropriate PFA receives the completed checklist by the 20th of the following month.

- *Monitoring and Notice of Concern (NOC) Logs.* Onsite monitors are required to keep a monitoring log and a NOC log.[22] The monitoring log helps the onsite monitors track and review the completion and results of internal and external audits required by the contract. A NOC is a memorandum the PMB staff submits to a contractor when the contractor is performing below a satisfactory level and the deficiency is more than minor or is a repetitive deviation from the contract requirements. Once a NOC is issued, the contractor must provide a written corrective action plan to the oversight staff, who ensure that the contractor implements and maintains its plan. BOP policy requires onsite monitors to use the NOC log to track NOCs until the deficiencies are resolved.

- *Written Evaluations.* The onsite monitors write evaluations of contract performance as required by the FAR, the Contracting Officer, or the PMB's internal procedures.[23] The FAR requires the BOP to use the Contractor Performance Assessment Reporting System to provide a record, both positive and negative, of a given contractor's performance during a specific period of time. In addition, the PMB's operating procedures require onsite monitors to issue the Oversight Facility Summary Report, a management-level assessment of the contractor's performance focused

[21] The checklist is generally standardized, but the oversight staff may vary its monitoring according to a contract's specific requirements. For example, Rivers Correctional Institution is required by contract to have a residential drug abuse treatment program because its population consists of approximately 50 percent U.S. citizens, primarily from the Washington, D.C., metropolitan area, many of whom have drug dependencies and who will return to the community when they complete their sentence.

[22] In response to recommendations in the OIG's report on the Reeves County contract prison, the BOP has incorporated the functions of the monitoring log and the NOC log into the checklist and added a step for documenting the contractor's follow-up efforts regarding identified deficiencies as the BOP no longer uses either log. See DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007.* Later in this report, we briefly discuss our findings on the BOP's use of the monitoring log during our review.

[23] The Contracting Officer ensures that the contractor adheres to the terms and conditions of the contract and has the authority to negotiate, award, cancel, and terminate contracts on behalf of the government.

primarily on quality of work and responsiveness to the BOP, annually and semiannually.

- *Performance Meetings.* The SSIM, SOM, and Contracting Officer have performance meetings with the contract prison management staff at least monthly. These meetings provide a management-level review and assessment of the contractor's quality of work and responsiveness, as well as a forum to discuss operational issues and oversight findings. Additionally, contract management staff from each operational area report on issues of significance within their respective departments.

In addition to the onsite monitors, the PMB has subject matter specialists for disciplinary hearings, intelligence, and health systems, who each provide operational assistance to the PMB field staff within their field of expertise. These specialists support the BOP's QAP, assist in monitoring contract compliance, and serve as Contracting Officer's Representatives.

Contract Facility Monitoring Branch

Within the BOP's Program Review Division, the CFM Branch consists of subject matter experts who use a comprehensive audit tool to conduct annual and ad hoc reviews of the contractor's performance in all of the vital functions, test the adequacy of internal controls, and assess risks in program and administrative areas. The CFM staff uses guidelines based on specific contract requirements, professional guidelines referenced in the contract, and applicable BOP policies. A CFM audit report can result in four levels of deficiency:

1. first-time deficiency,
2. repeat deficiency,
3. repeat repeat deficiency, and
4. significant finding.[24]

When the CFM team identifies repetitive or significant findings at a contract prison, the team may return for a follow-up assessment before the next annual audit. This follow-up may be a full or partial audit of the problematic department depending on the findings and/or level of deficiency previously identified. When a deficiency is serious enough to affect performance in the operational areas, the onsite monitors may suggest a deduction to the contractor's payment.

The CFM team includes a physician and a physician's assistant. In conjunction with CFM's annual review, the PMB's Health Systems Specialist (HSS) is tasked with the responsibility to assist in the oversight of contractor performance in

[24] Repeat deficiencies stem from failed internal controls that were developed to correct a noted deficiency. The BOP uses the term "repeat repeat deficiency" to describe a deficiency that is repeated twice or more. A "significant finding" generally consists of a series of related deficiencies that, taken together, constitute a failure of the program component. A significant finding can also be caused by a single event that results in a systemic program failure.

the area of health services. The HSS conducts a thorough review of health services at each contract facility at least every 6 months, or more frequently if the HSS determines it is needed.

Privatized Corrections Contracting Section

The Privatized Corrections Contracting Section is responsible for contract procurement and administration, including cost agreements, and the assignment and supervision of Contracting Officers at each of the contract prisons. The section also assists the PMB's oversight staff with contract interpretation and provides advice on contract requirements and NOC issuance. If a CFM audit finds serious deficiencies, the onsite PMB monitor writes a deduction proposal to the Contracting Officer. The Contracting Officer may consider other types of action, such as contract modification, in addition to deductions. In cases of numerous "repeat repeat" or significant deficiencies that go uncorrected over time, the BOP may issue a "cure notice" to indicate to the contractor that the BOP may terminate the contract if the problem is not corrected.

Expenditures on Contract Prisons

From FY 2011 through FY 2014, the BOP's annual expenditures on contract prisons increased 13.7 percent, from approximately $562 million in FY 2011 to $639 million in FY 2014. Since contracts with private prisons are fixed-price contracts, the payment amount does not change based on costs such as resources or time expended by the contractor.[25] An accounting of costs for specific departments or operations is not provided to the BOP. The contractors are responsible only for submitting an invoice to the BOP at the end of each month. The monthly invoice includes the monthly operating price that was negotiated prior to the start of the contract, which ensures the contractors receive a minimum payment from the BOP to staff the facilities and cover expenses as provided in the contract.

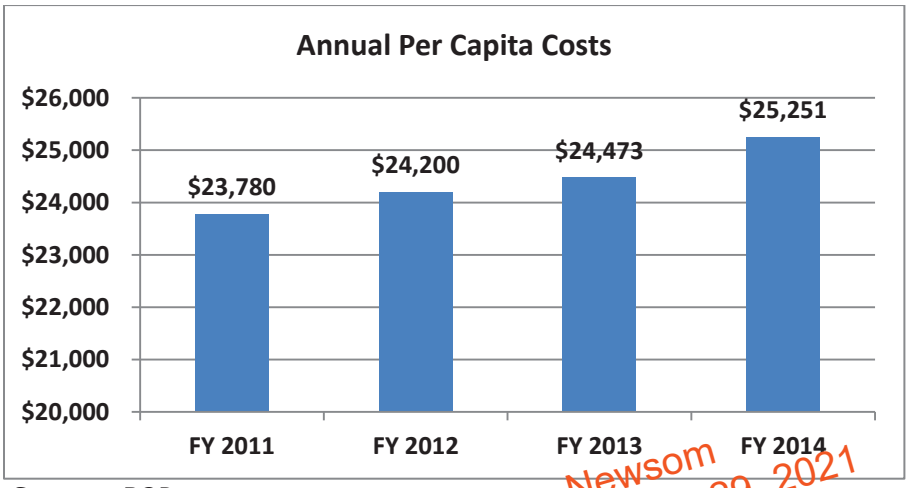
Because the BOP does not receive the breakdown of cost information under the fixed-price prison contracts, we were not able to analyze and compare costs incurred by function or department between the contract prisons and BOP institutions as part of this review. Moreover, we were unable to compare the overall costs of incarceration between BOP institutions and contract prisons in part because of the different nature of the inmate populations and programs offered in those facilities. The BOP does calculate the overall per capita annual and daily costs for housing its inmates in both BOP institutions and contract prisons. However, because of the factors discussed above, we do not draw, and caution

[25] According to the FAR, this type of contract is preferred when contract costs and performance requirements are reasonably certain, the government wishes to motivate a contractor to enhance performance, and other incentives cannot be used because contractor performance cannot be measured objectively. As stated in the FAR, fixed-price incentive contracts are to the government's advantage because the contractor has to "assume substantial cost responsibility and an appropriate share of the cost risk."

against drawing the conclusion from that data, which is summarized below, that contract prisons are necessarily lower cost than BOP intitutions on an overall basis. See Figures 2 and 3 for the BOP's annual costs per capita to house inmates in BOP low security institutions and contract prisons, respectively.

Figure 2

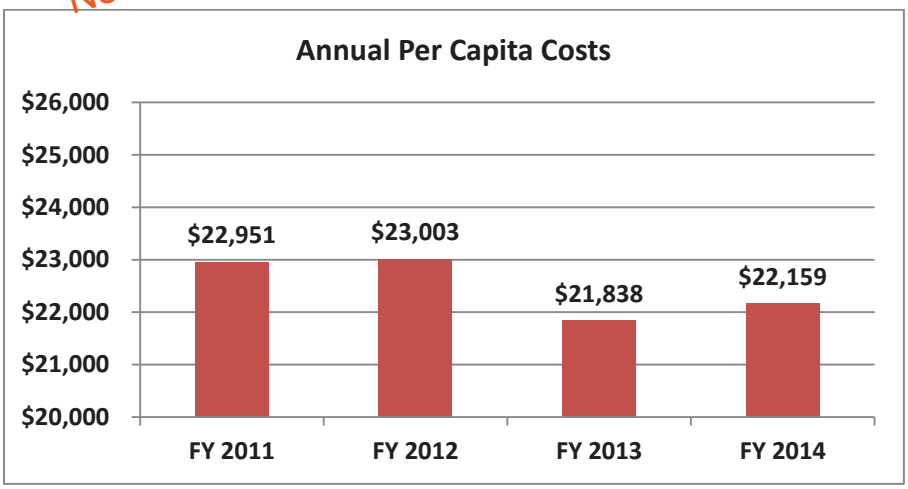
Annual Per Capita Costs for BOP Institutions
FY 2011 – FY 2014



Source: BOP

Figure 3

Annual Per Capita Costs for Contract Prisons
FY 2011 – FY 2014



Source: BOP

Based on this data from the BOP, for the 4 years of our review, the average annual costs in the BOP institutions and the contract prisons per capita were $24,426 and $22,488, respectively.

In this regard, the BOP's inability to analyze and compare costs for major expenditures such as medical and food-related expenses between the contract prisons and its own institutions is significant. The *Government Performance and Results Act Modernization Act of 2010* (GPRA) mandates that federal agencies post on their public websites performance plans that include all programs in the agency's budget. One of the required objectives of the performance plans is to "establish a balanced set of performance indicators to be used in measuring or assessing progress toward each performance goal, including, as appropriate, customer service, efficiency, output, and outcome indicators." The GPRA defines the efficiency measure as "a ratio of a program activity's inputs (such as costs or hours worked by employees) to its outputs (amount of products or services delivered) or outcomes (the desired results of a program)." Without the ability to compare costs, however, the BOP is unable to evaluate whether the contractors' services are consistent with the value or quality of service the BOP should be receiving based on the amount of money that is being spent and, therefore, is unable to comply with this aspect of the GPRA.[26]

The U.S. Government Accountability Office (GAO) expressed similar concerns in a December 2013 report that assessed the extent to which opportunities exist to enhance the transparency of information in the BOP's budget justifications for congressional stakeholders and decision makers.[27] The GAO found that the BOP's budget justification for FY 2014 included $2.5 billion for Inmate Care and Programs such as medical services, food service, education and vocational training, psychology services, and religious services. However, the budget justification did not include a breakdown of proposed funding amounts for each of these categories. The BOP's budget justification for FY 2014 also included $1.1 billion for "Contract Confinement," and, consistent with our discussion above, that category did not specify how those costs were to be allocated. We agree with the GAO that such data would be useful in identifying trends and cost drivers that may affect future costs.[28]

[26] The GPRA "directs OMB [Office of Management and Budget], each fiscal year, to determine whether each agency's programs or activities meet performance goals and objectives outlined in the agency performance plans and to submit a report on unmet goals to the agency head." See *GPRA Modernization Act of 2010,* 111th Cong., 2nd sess., S. 1116.

[27] GAO, *Bureau of Prisons: Opportunities Exist to Enhance the Transparency of Annual Budget Justifications*, GAO-14-121 (December 6, 2013) (accessed July 28, 2016).

[28] The GAO recommended that the Attorney General consult with congressional decision makers on providing additional BOP funding detail in future budget justifications and, in conjunction with the BOP, take action as appropriate. According to the GAO, the Department concurred with the GAO's recommendation and consulted with congressional Appropriations Committee staff to expand the level of detail in the two most recent budget requests, including an exhibit in the BOP's FY 2015 and FY 2016 budget submissions that provided additional details on BOP programs and activities. However, those submissions did not provide greater transparency or more cost information with regard to the BOP's expenditures on contract confinement.

RESULTS OF THE REVIEW

Contract Prisons Had More Safety and Security-related Incidents per Capita than BOP Institutions for Most of the Indicators We Analyzed

One way to assess how effectively the BOP monitors its contract prisons is to compare the statistical profile for contract and BOP institutions on key inmate safety and security incidents. To evaluate how the contract prisons performed relative to the BOP's institutions, we analyzed data from the 14 contract prisons that were operational during the period of our review and 14 selected BOP institutions with similar population sizes, geographical locations, and security levels, comparing data in eight key areas that were relevant to American Correctional Association (ACA) standards and were tracked by both the contract prisons and the BOP institutions: (1) contraband, (2) reports of incidents, (3) lockdowns, (4) inmate discipline, (5) selected grievances, (6) telephone monitoring, (7) urinalysis drug testing, and (8) sexual misconduct.[29] With the exception of having fewer positive drug tests and sexual misconduct incidents, we found that the contract prisons had more incidents per capita than the BOP institutions in all of the other key areas.[30] We discuss the results of our analysis below. Unless otherwise stated, we calculated monthly and annual averages per 10,000 inmates. See Appendix 1 for more details regarding our methodology and Appendix 6 for the full results of our analysis.

Contract Prisons Had More Frequent Incidents per Capita of Contraband Finds, Assaults, Uses of Force, Lockdowns, Guilty Findings on Inmate Discipline Charges, and Selected Categories of Grievances

In three-quarters of the data categories we analyzed, the contract prisons had more safety- and security-related incidents per capita than the comparable BOP institutions. The contract prisons had more frequent incidents per capita for three of the four types of contraband we analyzed: cell phones, tobacco, and weapons. Also, we examined 10 types of reports of incidents and found that the contract prisons had higher rates of assaults and uses of force. In addition, the contract prisons had more lockdowns, more guilty findings on serious inmate discipline charges, and more grievances submitted by inmates in selected categories. Finally, although the contract prisons are not subject to a minimum requirement for

[29] In this review, we were not able to evaluate all of the factors that contributed to the underlying data. Where our interviews or document analyses provided explanations for the data findings, we note this. However, we also note a number of areas where we believe the BOP needs to examine the reasons behind our findings more thoroughly and identify corrective actions. The BOP indicated in response to a working draft of this report that a number of factors, including inmate demographics and facility location, may result in variance in the data reported in these categories. According to the BOP, as of January 2014 inmates incarcerated in private facilities were primarily non-U.S. citizens with 72.1 percent from Mexico, while the selected BOP institutions had an average of 11.8 percent non-U.S. citizens. See Appendix 1 for more information on our methodology, including our data analysis.

[30] However, overall, we found that inmates at the contract prisons filed fewer grievances in all categories (including those beyond our eight selected categories).

monitoring inmate phone calls, we found that they monitored a lower percentage. We discuss these findings in greater detail below.

In addition to the specific categories of findings discussed in this section, we looked at the overall frequency of incidents among the three private prison contractors. The extent to which one contractor's facilities performed better or worse than others on these indicators varied. Overall, the GEO Group's (GEO) contract prisons had more incidents per capita compared to those operated by the Corrections Corporation of America (CCA) and the Management and Training Corporation (MTC) for contraband finds, several types of reports of incidents, lockdowns, guilty findings on inmate discipline charges, positive drug test results, and sexual misconduct; that CCA contract prisons had the highest rates of inmate fights and inmate assaults on other inmates; and that MTC contract prisons had the highest rates of inmate grievances and monitored the lowest percentage of inmate telephone calls. Appendix 6 provides the full results of our analysis of the key indicators by contractor. Among the contract prisons, the Rivers Correctional Institution (GEO), D. Ray James Correctional Institution (GEO), and McRae Correctional Institution (CCA) most often had more incidents per capita in the categories of data we analyzed, though again the number of categories and extent of the differences varied.[31]

Contraband

We examined two sets of contraband data: (1) annual data on cell phone confiscations and (2) monthly data on confiscations of drugs, weapons, and tobacco.[32] These types of contraband are especially harmful, among other reasons because they can allow inmates to continue to operate criminal enterprises during incarceration, enable violence and support addictions, or serve as alternate forms of currency for inmates. We found that, on average, the contract prisons annually confiscated eight times as many cell phones per capita from FY 2011 through FY 2014. In terms of overall totals, contract prisons confiscated 4,849 cell phones compared to 400 confiscated in the BOP institutions.[33] Figure 4 below shows the per capita number of cell phones found at contract prisons and BOP institutions by year.

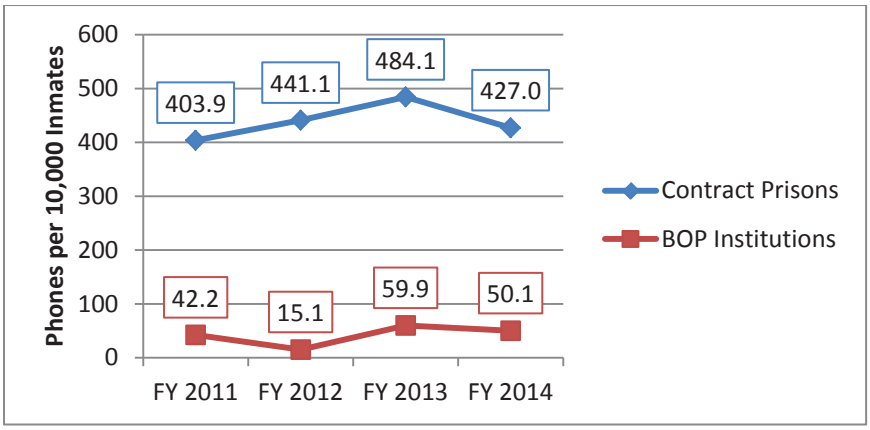
[31] For example, Rivers had the highest rates of contraband finds (excluding cell phones), inmate assaults on staff, uses of force, guilty findings on inmate discipline cases, inmate grievances, positive drug tests, inmate-on-inmate sexual misconduct, and the lowest phone monitoring rate. We found that D. Ray James had the highest rate of disruptive behavior incidents, as well as the second highest rate of inmate assaults on staff. McRae had the highest rate of inmate suicide attempts and self-mutilation, the second highest rate of positive drug tests, and the third highest rates of cell phones found and inmate grievances. The extent of the variation differed substantially among different indicators.

[32] The data on cell phones confiscated in the BOP institutions came from the BOP's annual Cell Phones Recovered reports, which are not broken out by month, so we analyzed annual rather than monthly data on cell phones confiscated in the contract prisons as well as other BOP institutions.

[33] These numbers include cell phones found on inmates as well as anywhere within contract prisons or BOP institutions. For the contract prisons, the contractors provided the count of cell phones.

Figure 4

Per Capita Cell Phones Confiscated at Contract Prisons versus BOP-managed Institutions FY 2011 – FY 2014



Source: OIG analysis of BOP and contractor data

The large volume of cell phones confiscated at the contract prisons compared to the BOP institutions during the period of our review was striking. Further, we found that two contract prisons (Big Springs and Adams County) accounted for 3,981 of the 4,849 (82 percent) cell phones confiscated at the 14 contract prisons.[34] Table 1 shows the total number of cell phones found at Big Springs, Adams Country, and the remaining 12 contract prisons, reflecting the substantial volume of cell phones that were confiscated.

Table 1

Cell Phones Found at Big Springs, Adams County, and the Remaining Contract Prisons, FY 2011 – FY 2014

Contract Prison	FY 2011	FY 2012	FY 2013	FY 2014	Total
Big Springs	786	1,068	813	331	**2,998**
Adams County	8	24	390	561	**983**
Remaining 12 Contract Prisons	238	117	210	303	**868**
Totals	**1,032**	**1,209**	**1,413**	**1,195**	**4,849**

Source: OIG analysis of contractor data

According to contractor data, Big Springs accounted for 2,998 of 4,849 cell phones (62 percent) confiscated at the 14 contract prisons. While the number of cell phones confiscated at Big Springs peaked at 1,068 in FY 2012, confiscations decreased by 70 percent, to 331 in FY 2014. According to a Privatization Field Administrator (PFA), the high number of cell phones confiscated at Big Springs was

[34] As of September 2014, Big Springs' inmate population was 3,403, the largest of the contract prisons, and Adams County's was 2,304. Together, these two prisons accounted for 20 percent of the total combined population of the BOP's 14 contract prisons at that time.

due to the prison's proximity to a public road and passersby being able to throw cell phones over its perimeter fence. The PFA stated that installing a tall net around the perimeter fence in the spring of 2013 helped reduce the number of cell phones entering the prison in that manner. The PFA stated that the prison also worked to improve relations with local law enforcement so that more cell phone incidents were fully prosecuted.

By contrast, the number of cell phones confiscated at Adams County increased from 8 in FY 2011 to 561 in FY 2014. In May 2012, there was a riot at the prison, and subsequently the contractor instituted heightened security measures, including new gates, increased security staff coverage, and greater controls over inmate movements. According to the prison's self-assessment, these measures resulted in an increase in contraband finds. However, even without the cell phones confiscated at Big Springs and Adams County, there were still more than twice as many cell phones confiscated at contract prisons than at BOP institutions during the period of our review. Staff confiscated 868 phones during this period in the remaining 12 contract prisons, compared to 400 confiscated in all 14 BOP institutions.

While the numbers may not have been large relative to the cell phone confiscations, we also found that the contract prisons had more frequent weapon and tobacco confiscations per capita than the BOP institutions but less frequent drug confiscations. Table 2 shows the average monthly finds per capita for these three types of contraband over the period of our review.

Table 2

Average Monthly Finds Per Capita for Weapons, Tobacco, and Drugs at Contract Prisons and BOP Institutions FY 2011 – FY 2014

	Weapons	Tobacco	Drugs	Combined
Contract Prisons	3.2	2.5	1.8	7.6
BOP Institutions	1.8	1.9	3.0	6.6

Note: Due to rounding, the combined numbers are not an exact sum of the individual contraband categories. Averages are per 10,000 inmates.

Source: OIG analysis of BOP and contractor data

On average, the contract prisons had nearly twice as many weapons confiscated as BOP institutions (3.2 compared to 1.8) monthly. Also, the contract prisons had 2.5 tobacco finds monthly, on average, compared to 1.9 in the BOP institutions. Conversely, the BOP institutions had more drug finds than the contract prisons, with 3 monthly, on average, in the BOP institutions compared to 1.8 in contract prisons. Overall, we found that the contract prisons had 7.6 contraband finds in all 3 categories combined, more than the 6.6 finds in these 3 categories in the comparable BOP institutions.

We note that not all of the contract prisons found contraband in every category over the 4 years of our review. We did not compare contraband interdiction efforts between the contract prisons and BOP institutions as part of this

review.[35] Therefore, we were unable to evaluate whether higher rates of contraband finds actually indicated more contraband present in either a contract prison or a BOP institution, a more aggressive or effective program for discovering and confiscating contraband, or some combination of those or other factors. However, where the disparity between contract prisons and BOP institutions is greatest, such as in cell phone recoveries, this may reflect at least to some extent a problem that should be examined and addressed by the BOP.

Reports of Incidents

We analyzed data on 10 types of incidents: (1) assaults by inmates on inmates, (2) assaults by inmates on staff, (3) sexual assaults by inmates on staff, (4) inmate deaths, (5) inmate fights, (6) cell fires, (7) inmate suicide attempts and self-mutilation (combined), (8) inmate suicides, (9) disruptive behavior by inmates, and (10) staff uses of force on inmates.[36] We found that the contract prisons had higher rates of inmate-on-inmate and inmate-on-staff assaults, as well as higher rates of staff uses of force. We also found the contract prisons had comparatively equal rates of fights and suicide attempts and self-mutilation, and that the contract prisons had lower rates of disruptive behavior incidents.

As to the first two types of incidents, our analysis showed a higher rate of assaults in the contract prisons than in the BOP institutions, both by inmates against inmates and by inmates against staff. Per capita, the contract prisons reported a 28 percent higher average of inmate-on-inmate assaults (3.3 assaults monthly, on average, compared to 2.5 on average in BOP institutions).[37] An analysis of these assaults per capita by year indicated that both the contract prisons and the BOP institutions saw their numbers rise in FY 2012; but the rise was more dramatic in the contract prisons and remained high through FY 2014. Figure 5 below shows the per capita inmate-on-inmate assaults each year.

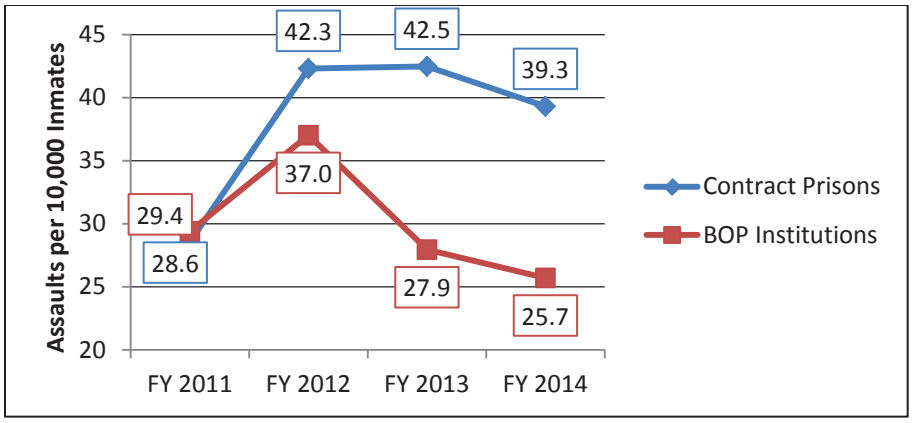
[35] The OIG is separately reviewed and reported on the BOP's contraband interdiction efforts. See DOJ OIG, *Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts*, Evaluation and Inspections (E&I) Report 16-05 (June 2016).

[36] The first two categories of general assaults do not include sexual assaults by inmates on inmates or by staff on inmates, which we discuss separately under sexual misconduct, below.

[37] See Appendix 1 for the formula used to calculate the percentage differences presented throughout this section.

Figure 5

Per Capita Inmate-on-Inmate Assaults in Contract Prisons and BOP Institutions FY 2011 – FY 2014



Source: OIG analysis of BOP and contractor data

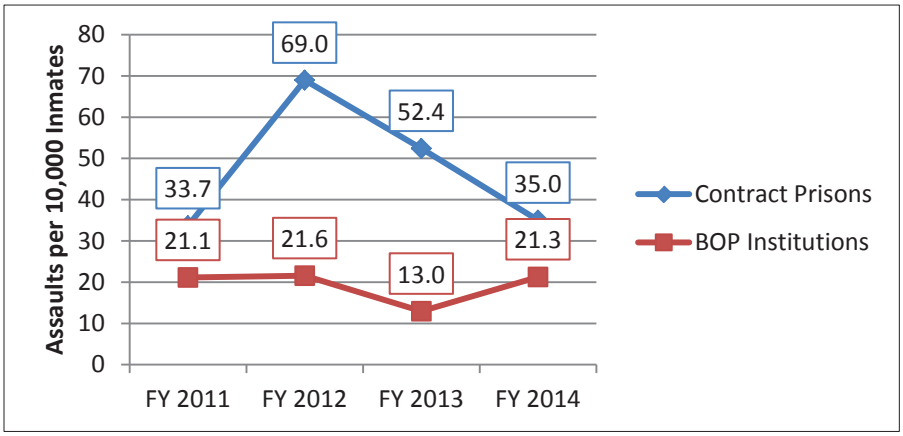
With regard to inmate-on-staff assaults, we found that the contract prisons reported well more than twice as many such incidents each month on average as compared to the BOP institutions: 4.2 assaults monthly, on average, in the contract prisons versus 1.6 in the BOP institutions. One contract prison, D. Ray James, accounted for 155 of 526 (29 percent) of the assaults on staff in all contract prisons from FY 2011 through 2014, including 114 assaults on staff in FY 2012 alone. A PFA told us that D. Ray James, operated by GEO in Folkston, Georgia, was having significant performance issues on its contract during this period and that the BOP had issued a cure notice in the fall of 2012.[38]

However, the PFA said the contractor had subsequently made personnel changes at the prison and its performance had noticeably improved. Our analysis found that the number of inmate-on-staff assaults at D. Ray James was reduced after FY 2012, with only one assault recorded in FY 2014. Figure 6 below shows the per capita numbers of assaults by inmates on staff each year.

[38] The PFA stated that a cure notice is issued to a contract prison that is not meeting the vital functions of its contract and indicates that the BOP is on the brink of ending the contract. Federal Acquisition Regulation 49.607 specifies that a cure notice is required when a contract is to be terminated for default before the delivery date. In FY 2012, D. Ray James received 47 notices of concern (NOC), more than double the highest number of NOCs that any other contract prison received in a 1-year period during the 4-year period of our review.

Figure 6

Per Capita Assaults by Inmates on Staff in Contract Prisons Compared to BOP Institutions FY 2011 – FY 2014



Source: OIG analysis of BOP data

With regard to the other selected incidents, our analysis of BOP and contractor data also found that the contract prisons had 17 percent more use-of-force incidents; approximately the same rate of inmate fights, self-mutilations, and suicide attempts; and a 29 percent lower rate of disruptive behavior incidents. Appendix 6 shows the monthly averages and 4-year totals for each of these types of incidents.

Finally, we found few instances of inmate-on-staff sexual assaults, cell fires, and suicides in either the contract prisons or the BOP institutions. We excluded inmate deaths from the discussion above because they can occur for reasons unrelated to security, such as age-related illness, and the clinical adequacy of inmate medical care fell outside the scope of our review.[39] However, we did analyze comparative data on reports of incidents of inmate deaths to evaluate the existence of disparities in the inmate death rate between the contract prisons and BOP institutions. While we found that the contract prisons actually had a lower monthly per capita average of inmate deaths compared to BOP institutions — 0.4 inmate deaths compared to 1.2 in the BOP institutions — we still believe that any disparity in the inmate death rate bears closer examination to determine the causes for differing rates and any steps that might be taken to reduce such occurrences. See Appendix 6 for the results of our analysis for all 10 types of incident reports. Overall, we believe the BOP needs to examine the frequency of

[39] In 2008 and again in 2010, the OIG completed an audit of the BOP's efforts to manage inmate healthcare. See DOJ OIG, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care*, Audit Report 08-08 (February 2008), and *Follow-up Audit of the Federal Bureau of Prisons' Efforts to Manage Inmate Health Care*, Audit Report 10-30 (July 2010). See also DOJ OIG, *Review of the Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, E&I Report 15-05 (May 2015), and *Review of the Federal Bureau of Prisons' Medical Staffing Challenges*, E&I Report 16-02 (March 2016).

these different types of incidents in its contract prisons and determine what corrective action may be required to address them.

As the BOP emphasized in response to a working draft of this report, no two BOP or private facilities are identical demographically. We acknowledge that inmates from different countries or who are incarcerated in various geographical regions may have different cultures, behaviors, and communication methods. The BOP stated that incidents in any prison are usually a result of a conflict of cultures, misinterpreting behaviors, or failing to communicate well. One difference within a prison housing a high percentage of non-U.S. citizens is the potential number of different languages and, within languages, different dialects. Without the BOP conducting an in-depth study into the influence of such demographic factors on prison incidents, it would not be possible to determine their impact.

Lockdowns

During a prison lockdown, inmates are restricted to their quarters and their movements and communication are also restricted, often in response to a disturbance or incident that threatens the secure and orderly running of the prison. According to the BOP:

> The purpose of a lockdown of a correctional facility is to ensure the security of the institution, maintain control of the inmate population, and ascertain the concerns of the inmate population. Lockdowns are often a precautionary measure used to maintain control during a period of inmate dissention. During each lockdown, oversight staff monitors the contractor's actions and progress to return the institution to normal operations as quickly as possible.

During the period of our review, contract prisons reported more lockdowns than the comparable BOP institutions. The contract prisons reported 30 partial lockdowns and 71 full lockdowns, while the BOP institutions reported no partial lockdowns and 11 full lockdowns, meaning that these security measures occurred more than 9 times as often at contract prisons.[40] Moreover, 12 of the 14 (86 percent) contract prisons reported full or partial lockdowns, while only 6 of the 14 (43 percent) BOP institutions reported lockdowns. Of the 12 contract prisons that reported a full or partial lockdown, Big Springs had the highest number, with 28 of the 101 partial and full lockdowns reported, or 28 percent of all contract prison lockdowns. Among the reasons cited in the data we obtained for lockdowns at Big Springs and other contract prisons were inmate demonstrations, fights, inmate assaults on staff, attempts to introduce significant contraband, conflicts between inmate gangs or racial groups, food strikes, inmates refusing to work, shakedowns, and local environmental or weather emergencies. In some cases, the contractors' descriptions of the circumstances surrounding lockdowns noted that inmates expressed concerns over specific issues, including medical care, commissary prices,

[40] A partial lockdown affects only some housing units in a prison; a full lockdown affects the entire prison.

inmate pay, movement restrictions, and television channels. While we could not review the basis for lockdowns in the context of this review, the greater number of such incidents at contract prisons suggests a need for the BOP to examine and address the issue.

Discipline

We analyzed inmate discipline data on charges such as murder, assault, sexual assault, possession of weapons or drugs, setting fires, fighting, and participating in riots or demonstrations. We found that the contract prisons had a higher number of guilty findings on these types of serious offense charges. The contract prisons had 77.9 guilty findings monthly on average (10,089 over 4 years), compared to 64.7 in the BOP institutions (7,439 over 4 years).[41] We believe that a higher incidence of substantiated misconduct may be an indication of greater inmate behavioral challenges in contract facilities, which merits further analysis and action by the BOP.

Grievances

Contract terms specify that the contract prisons must develop their own internal grievance policies and adhere to federal regulations setting forth procedures for inmates to receive formal review of issues of concern to them.[42] As part of our analysis, we selected eight categories of grievances we deemed particularly relevant to safety and security to analyze collectively and separately.[43] We selected grievances related to medical care and food because each was specifically identified among reasons that led to lockdowns at contract prisons, as detailed above. In addition to medical care and food, the grievance categories we selected as particularly relevant to this analysis were conditions of confinement, institutional operations, safety and security, sexual abuse or assault, Special Housing Units (SHU), and complaints against staff. We found that in these eight categories collectively, inmates at the contract prisons submitted 24 percent more grievances: 32.2 grievances per month, on average, compared to 25.3 for the BOP institutions.

Individually, not all of the eight grievance categories we selected had a larger number of grievances or showed notable differences.[44] However, our analysis did show that, per capita:

[41] Our analysis of the discipline data included sexual misconduct incidents that were also analyzed separately, as described below.

[42] 28 C.F.R. 542.

[43] Because the contract prisons sometimes used different descriptions for the same types of grievances and some descriptions were more detailed than necessary for the level of our analysis, we consolidated and standardized the grievance categories.

[44] Not all contract prisons had grievances in all of the categories. See Appendix 7 for a detailed comparison between contract prisons and BOP institutions for each of the eight grievance categories.

- Contract prison inmates submitted more than twice as many grievances regarding prison staff as inmates in the BOP institutions, averaging 12.9 monthly compared to 6.2 in the BOP institutions.

- There were more grievances regarding SHUs at the BOP institutions, with an average of 2.4 monthly compared to 0.2 monthly in the contract prisons.

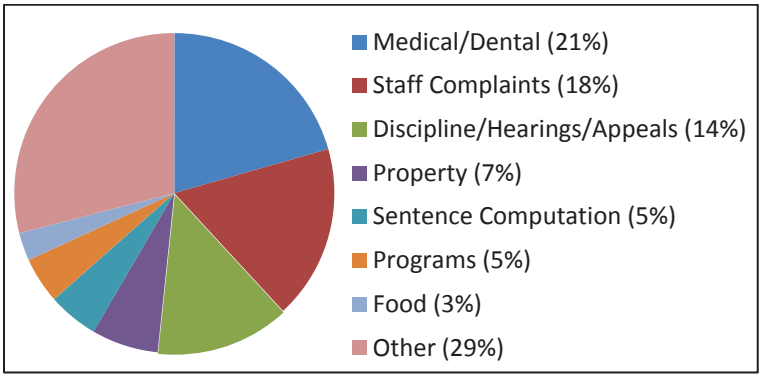
- There were more food grievances at the contract prisons, on average 2.1 food grievances monthly compared to 1.2 in the BOP institutions.

- There was little difference in the number of medical grievances (14.3 at the contract prisons versus 14.1 at the BOP institutions on average monthly).

However, overall, we found that inmates at the contract prisons filed fewer grievances in all categories (including those beyond our eight selected categories). According to BOP data, inmates at the contract prisons filed, on average, 72.6 grievances per month compared to 121.5 grievances at the BOP institutions and a higher percentage of grievances were granted in the contract prisons. The overall rate of inmate grievances granted in the contract prisons over the 4 years of our review was 8.1 percent, while in the BOP institutions 5.2 percent were granted. Of the 8,756 total grievances filed by inmates at the contract prisons from FY 2011 through FY 2014, 1,800 (21 percent) were related to medical concerns, 1,538 (18 percent) were complaints about prison staff, and 1,186 (14 percent) were related to the inmate disciplinary process. Figure 7 below shows the most common categories of grievances in the contract prisons.

Figure 7

Most Common Inmate Grievance Categories in the Contract Prisons, FY 2011 – FY 2014



Note: Less common types of grievances included in the "Other" category (mauve) included transfers, classification, telephone and mail, institutional operations, conditions of confinement, and alleged violations of federal or state laws and regulations.

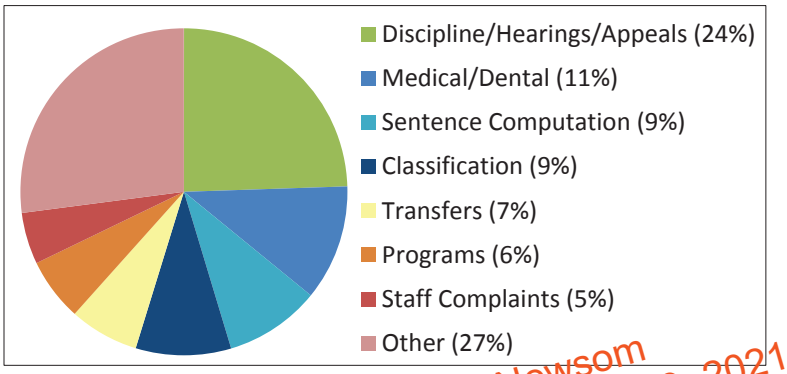
Source: OIG analysis of BOP and contractor data

By comparison, in the BOP institutions, of 14,098 total grievances filed by inmates, 3,451 (24 percent) were related to inmate discipline, hearings, and

appeals, followed by 1,609 grievances (11 percent) on medical concerns and 1,332 grievances (8 percent) on sentence computation issues. The remaining 47 percent of grievances at contract prisons and 57 percent of grievances at BOP institutions were related to categories including inmate classification, transfers, legal access, work assignments, residential reentry centers, and telephone and mail. Figure 8 below shows the most common categories of grievances in the BOP institutions.

Figure 8

Most Common Inmate Grievances Categories in the BOP Institutions, FY 2011 – FY 2014



Note: Less common types of grievances included in the "Other" category (mauve) included residential reentry centers, telephone and mail, work assignments, SHUs, and legal access issues.

Source: OIG analysis of BOP and contractor data

Comparison of the distribution of grievances between the contract prisons and the BOP reveals that the concerns of inmates in the contract prisons are more focused on medical and dental issues (21 percent of the contract prison grievances as opposed to 11 percent of the BOP institution grievances). Similarly, the percentage related to staff complaints is much larger at the contract prisons than the BOP institutions (18 percent in the former compared to 5 percent in the latter). The higher focus on particular areas in contract prison grievances suggests that the BOP should examine those areas and develop plans to address any underlying issues.

Monitoring of Inmate Phone Calls

The BOP requires that BOP institutions monitor at least 5 percent of inmate phone calls.[45] Contracts do not require the contract prisons to monitor a specific percentage of inmate phone calls. However, a Privatization Management Branch (PMB) Intelligence Specialist told us that the BOP recommends that the contract

[45] Regional BOP Directors may set higher monitoring goals, ranging from 10 to 15 percent of calls monitored randomly for BOP institutions within their region. See DOJ OIG, *The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates*, E&I Report I-2006-009 (September 2006).

prisons monitor a minimum of 5 percent of inmate phone calls. The Intelligence Specialist stated that it is good correctional practice to monitor at least 5 percent of calls to gather intelligence. We found that all but two of the contract prisons met or exceeded the BOP's 5 percent phone call monitoring standard on average each month from FY 2010 through FY 2014. However, collectively, the contract prisons monitored fewer phone calls than the BOP institutions. Our analysis found that the BOP institutions monitored 21 percent of all inmate phone calls on average each month, compared to only 8 percent at the contract prisons.

We also found that the number of inmate phone calls that the contract prisons can monitor is limited by the unavailability of both bilingual staff and technological resources. With the exception of the Rivers Correctional Institution (Rivers), which houses approximately 50 percent of its inmates from the District of Columbia, most of the contract prison population consists of foreign national inmates, many of whom are Mexican nationals serving sentences for immigration violations.[46] At Rivers, staff told us that one full-time translator and another staff member monitored Spanish-language phone calls in addition to performing their other duties but were not able to monitor all phone calls that should have been monitored. We found similar circumstances at another contract prison we visited, where a single bilingual officer was responsible, among other duties, for monitoring all Spanish-language calls.

We were also told that the contract prisons do not have the same telephone technology that is available to BOP institutions to monitor inmate phone calls. A PMB Intelligence Specialist told us that with access to the BOP's TRUINTEL system, it was possible for staff to listen to inmates' phone calls in the BOP institutions through a desk telephone or through their desktop computers. Therefore, various staff in different departments throughout the institutions could monitor phone calls. However, staff at contract prisons do not have access to TRUINTEL or the intelligence it provides from other BOP institutions, nor are contract prison inmate phone calls recorded in TRUINTEL, all of which limits contract prisons' and the BOP's opportunities to gather intelligence.

Even though contract prisons are generally meeting the minimal monitoring standard, we believe that the lower monitoring rate at contract prisons and the personnel and technological hurdles faced there are issues that the BOP should consider and address.

The Contract Prisons Had Fewer Incidents per Capita of Positive Drug Tests and Sexual Misconduct

Another indicator of safety and security in a prison setting is the number of positive drug tests and sexual misconduct incidents per capita. Our analysis indicated that the contract prisons had fewer inmates who tested positive for drugs through urinalysis testing than the BOP institutions. We also found that the

[46] As of FY 2013, 96 percent of the BOP's inmate population in contract prisons consisted of foreign nationals.

contract prisons had lower rates of guilty findings on serious disciplinary charges of inmate-on-inmate sexual offenses. Additionally, the contract prisons had fewer allegations of sexual misconduct by staff against inmates. We discuss these findings in greater detail below.

Urinalysis Drug Tests

According to BOP policy and contract requirements, contract prisons and other BOP institutions must drug test 5 percent of inmates every month. We found that, per capita, the contract prisons had fewer positive urinalysis drug test results, on average monthly (2.1) than the BOP institutions (3.4), with a total over 4 years of 263 positive results in the contract prisons compared to 376 in the BOP institutions. However, the contract prisons also drug-tested a slightly lower percentage (7 percent) of inmates on average each month than the BOP institutions (8 percent). Despite the lower testing percentage, on average over the 4-year period of our review, all contract prisons drug tested over 5 percent of inmates per month, exceeding contract requirements.[47] Given the limitations of the BOP's data, which included only the number of inmates tested and the number of positive and negative results, we were not able to determine whether the lower per capita positive drug test results in contract prisons reflected less drug usage, an issue with the drug testing procedures being followed in those facilities, or some combination of these; but we believe that these are issues that merit closer examination and analysis by the BOP.

Sexual Misconduct

We analyzed two types of sexual misconduct data: (1) guilty findings on disciplinary charges of inmates committing sexual misconduct against other inmates and (2) allegations of staff sexual misconduct against inmates. In both categories, the data that we reviewed generally reflected that the contract prisons had fewer incidents per capita than the BOP institutions.

However, we found that some of the data on inmate-on-inmate sexual misconduct was recorded inconsistently, for both the contract prisons and the BOP institutions. BOP Intelligence Specialists produce monthly intelligence reports on the contract prisons with the number of reported sexual assault incidents, as well as a breakdown of categories of inmate-on-inmate sexual misconduct allegations. A PMB Intelligence Specialist told us these two types of data should be consistent with each other; however, we determined that the overall number of incidents and the number of incidents by category were frequently inconsistent. In addition, data on inmate discipline cases with sexual misconduct guilty findings indicated more inmate-on-inmate misconduct in contract prisons than was recorded in the monthly intelligence reports. Further, the BOP institutions reported no inmate-on-inmate sexual misconduct incidents, even though the data on inmate discipline in the BOP

[47] The contract requires the contractor to adhere to BOP Program Statement 6060.8, Urine Surveillance and Narcotic Identification (March 8, 2001). The program statement stipulates that each institution should randomly drug test 5 percent of its total population each month.

institutions also showed guilty findings on sexual misconduct charges. The BOP's contract prisons are currently subject to *Prison Rape Elimination Act of 2012* (PREA) reporting requirements in their contracts, as are the BOP's noncontract institutions by statute.[48] However, since the rules for PREA took effect in August 2012, as part of this review we did not evaluate the contract prisons' compliance with PREA or how it may have affected the contract prisons' sexual misconduct incident reporting.

Given the limitations of the data on reports of incidents for inmate-on-inmate sexual misconduct, we focused our analysis on inmate discipline cases that resulted in guilty findings for charges of sexual misconduct.[49] Over the period of our study, we found that the contract prisons had approximately 9 percent less guilty findings on average annually in sexual misconduct cases than the BOP institutions. The contract prisons had 16.6 guilty findings annually, on average, as opposed to 18.1 in the BOP institutions. However, we also found that 50 of 156 (32 percent) of the contract prison inmate-on-inmate sexual misconduct guilty findings occurred at one contract prison, Rivers, between FY 2011 and 2014, and we believe that the disparity between different facilities on this issue warrants closer examination by the BOP.

Staff-on-inmate sexual misconduct is not tracked through reports of incidents, which apply only to inmate misconduct. Instead, allegations of staff misconduct against inmates must be reported to the BOP's Office of Internal Affairs (OIA). Our analysis of OIA data found that the contract prisons reported fewer misconduct allegations than the BOP institutions.[50] During our review period, the contract prisons reported 97 staff sexual misconduct allegations compared to 139 staff sexual misconduct allegations reported from the BOP institutions. Adjusting for population differences, the contract prisons averaged 9 allegations annually, compared to 15 on average in the BOP institutions. Of course, no level of sexual misconduct is acceptable, and we strongly encourage the BOP to continue to work to address this issue in both contract prisons and BOP institutions.

OIG Site Visits Revealed Safety and Security Concerns and Inappropriate Housing Assignments

The BOP requires all of its contract prisons to provide a safe and secure setting for staff and inmates and to maintain ACA accreditation throughout the term of their contract. We found that while each contract prison we visited was cited for at least one safety or security deficiency during the period of our review, these

[48] PREA requires prisons to track allegations of sexual misconduct incidents. The OIG analyzed emerging issues with PREA implementation in *Progress Report on the Department of Justice's Implementation of the* Prison Rape Elimination Act, E&I Report 15-1 (October 2014).

[49] Specifically, we analyzed Codes 114 (Sexual Assault by Force), 205 (Engaging in Sexual Acts), 206 (Making Sexual Proposals or Threats to Another), and 229 (Sexual Assault without Force).

[50] Contract prisons and BOP institutions are required to report all allegations of staff sexual misconduct to the OIA. The OIA then notifies the OIG Investigations Division about the allegations, and the OIG decides which it should investigate and which should be referred back to the OIA for investigation or delegation to institutional staff to investigate.

issues were addressed by the contract prisons and each maintained ACA accreditation throughout the period covered by our review. However, during our fieldwork, we learned that two of the three facilities we visited housed newly received general population inmates in the SHU, inconsistent with ACA standards and BOP policy, and neither prison had been cited for a deficiency as a result.

Safety and Security Deficiencies

In addition to the concerns relating to inmate placement in the SHU detailed below, we discovered that some contract prisons experienced other safety and security issues during the period of our review. The three contract prisons we visited were each cited for one or more safety and security related deficiencies. A contract prison receives a deficiency when it violates a policy that affects the quality of service provided under the contract. These included administrative infractions, such as improper storage of use-of-force video footage, as well as other deficiencies that the BOP determined were more serious or systemic in nature, such as a failure to initiate discipline in over 50 percent of incidents reviewed by the onsite monitors over a 6-month period. However, the contractors corrected the safety and security deficiencies that the BOP identified. As a result, the BOP determined that each prison was sufficiently compliant with the safety and security aspects of its contract to continue with the contract during the period covered by our review.[51] Table 3 shows the safety and security indicators within the correctional services area and the number of deficiencies the BOP identified during our review period.[52]

Table 3

Number of Deficiencies Received in Contract Prisons the OIG Visited, FY 2011 – FY 2014

Security Indicators	Dalby	Eden	Rivers
Use of Force	1	1	0
Reports of Incidents	0	1	0
Inmate Death Notifications	0	0	0
Inmate Urinalysis Testing	1	0	0
Inmate Disciplinary Hearings	0	2	0
Sexual Assaults	0	1	0
Inmate Grievances	0	0	0
Contraband	1	1	1
Lockdowns	0	0	0
Suicides	2	0	0
TOTAL	**5**	**6**	**1**

Source: BOP data

During our review period, the 3 contract prisons we visited collectively received 12 deficiencies in the security indicators we analyzed. The Giles W. Dalby

[51] To maintain a contract, a contract prison must remain compliant with each operational area of the contract. See Contract Requirements in the Introduction for discussion of the operational areas.

[52] The three contract prisons were also cited for deficiencies in other areas not included in Table 3, such as administration, food service, and human resources.

Correctional Facility (Dalby) received five deficiencies in four areas: use of force, inmate urinalysis testing, contraband, and suicides (two). The Eden Detention Center (Eden) received six deficiencies in five areas: use of force, reports of incidents, inmate disciplinary hearings (two), sexual assaults, and contraband. Rivers received one deficiency for contraband. Of the three contract prisons, none was found deficient in the policy requirements pertaining to the areas of inmate death notifications, inmate grievances, or lockdowns.

We determined that for each of the safety and security related deficiencies that BOP onsite monitors identified during our study period, the contractor responded to the BOP and took corrective actions to ensure the prison was in compliance with policies and the contract. Depending on the severity of the security deficiency, corrective actions included providing training or retraining to the affected staff, increasing supervisory oversight, revising policy, and/or taking disciplinary action against staff. None of the three prisons lost its ACA accreditation because of these security related deficiencies.

Two of the Three Contract Prisons We Visited Routinely Housed Newly Received General Population Inmates in the SHU

At two of the three contract prisons we visited, we learned that all newly received inmates were housed in the SHU due to lack of available bed space in general population housing units, which is contrary to both ACA standards and BOP policies. Dalby placed new inmates directly into administrative segregation in the SHU for an average of 20 days pending available bed space in the general population. At the time of our visit, 73 inmates were housed in the SHU at Dalby. The Warden informed us that a majority of these were new inmates awaiting beds in the general population. Similarly, Eden housed new inmates in administrative segregation in the SHU for an average of 21 days before a bed became available in the general population. At the time of our visit to Eden, 71 of the 100 inmates in the SHU were waiting for beds in the general population.

The placement of general population inmates in the SHU due to lack of bed space is inconsistent with the ACA standard that states that an inmate may be placed in administrative segregation if the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates, or the security or orderly running of the institution.[53] Under ACA standards, an inmate can also be placed in the SHU for disciplinary segregation or detention only if a disciplinary committee or Disciplinary Hearing Officer has determined, after an impartial hearing, that the inmate is guilty of a serious rule violation. The placement of inmates in the SHU due to lack of bed space in the general population is also inconsistent with parallel BOP policies, which explicitly state that "when

[53] According to BOP policy, other appropriate reasons for placement in administrative segregation include being under investigation for an alleged rule violation or criminal act, pending investigation for a criminal trial, protective custody for the inmate, or pending transfer to another institution.

placed in the SHU, you [an inmate] are either in administrative detention status or disciplinary segregation status."[54]

Management at both Dalby and Eden acknowledged that the newly received inmates had not engaged in any conduct that warranted their placement in the SHU. Yet, once placed in the SHU, these new inmates became subject to the same security measures as inmates placed in administrative segregation for specific security related reasons. These measures included restricted and controlled movements; limited access to programs such as educational or vocational programs, as well as work details; and limited telephone calls.[55]

While using the SHU to house new inmates is inconsistent with both ACA standards and BOP policy, we found that neither contract prison had been cited for a deficiency for this practice. According to contract prison management and BOP staff, contract prisons housed new inmates in the SHU because both the BOP and its contractors had interpreted language in their contracts as permitting SHU beds to be included in the general population bed count, rather than in a separate category. Moreover, according to the contracts, "The contractor does not have a right of refusal and shall accept all designations from the BOP." We were told that the BOP sent new inmates to Eden because there appeared to be beds available based on the inmate population data provided by the contractor, even though the beds were actually in a SHU, and Eden could not refuse to accept these new inmates under its contract. Wardens at both Dalby and Eden told the OIG they believed that housing new inmates in the SHU was not good correctional practice.[56]

When the OIG learned about this practice, we brought it to the attention of the BOP Director (see Appendix 4 for the Inspector General's letter to the BOP Director). In response, the BOP Director informed the Inspector General of the following: (1) All new inmates awaiting general population bed space had been removed from the SHU and housed in the general population; (2) all movement into contract prisons was discontinued if the movement would result in SHU placement; (3) 5 of the 14 contracts were modified to address this issue (9 of the 14 contracts did not contain language that required modification prior to the Inspector General's letter); and (4) all 14 contracts prohibit SHU placement for inmates unless there is a policy-based reason to house them in administrative or disciplinary segregation. The BOP Director further stated that the onsite monitors and Contracting Officers would ensure contract compliance, especially regarding placement of inmates in the SHU. (See Appendix 5 for the BOP Director's response

[54] BOP Program Statement 5270.10, Special Housing Units (August 1, 2011).

[55] Inmates in administrative and disciplinary segregation may leave their cells only under handcuffed escort by Correctional Officers for 1 hour of exercise, 5 times per week, or for showers several times per week. Also, inmates must have meals provided to them in their cells. Finally, counselors and medical and other program staff are required to visit the SHU daily to meet with each inmate individually at their cell. All of these activities are very time intensive for the staff.

[56] The Warden at Dalby informed us that the prison and the BOP had just signed a contract modification to expand the number of beds in the general population and reduce the previously required number of SHU beds, thereby creating sufficient beds in the general population for newly received inmates.

to the Inspector General addressing this issue.) Since that time, the BOP informed the OIG that the practice of housing new inmates in the SHU is no longer occurring in the contract prisons and that there has been no further non-compliance identified to date by the BOP regarding this issue.

The BOP's Monitoring of Contract Prisons Needs Improvement

We found two principal areas of concern with the BOP's monitoring of contract prisons: (1) a tool the BOP onsite monitors use to monitor day-to-day contract compliance, the Large Secure Adult Contract Oversight Checklist (checklist), does not address certain important BOP policy and contract requirements in the areas of health services and correctional services and (2) the monitoring of health services for contract compliance lacks coordination among BOP staff responsible for health services oversight. As a result, the BOP's day-to-day monitoring may be less effective in ensuring that the inmate population it houses in contract prisons receives appropriate health and correctional services. We discuss each of these issues in more detail below.

In April 2015, the OIG issued a report on the Reeves County contract prison that included findings and recommendations related to the BOP's monitoring of all contract prisons.[57] In response to the OIG's recommendations, the BOP took many corrective actions, including in the areas of health and correctional services. In addition, the BOP informed us of additional steps taken in response to concerns identified in this current review. Below, we acknowledge the BOP's efforts to improve its monitoring of contract prisons and discuss additional steps the BOP should take to further ensure that these facilities are safe and secure places to house federal inmates.

The Onsite Monitors' Checklist

We found that the checklist, a monthly contract monitoring tool onsite monitors use to document their day-to-day efforts to ensure contract prisons comply with BOP policy and contract requirements, could be further improved. We focused our analysis on the onsite monitors' checklist because, as described by the PMB operating procedures, it is an important element of the BOP's Quality Assurance Plan, as well as a mechanism used to document contract compliance on a daily basis. We believe onsite monitors are best positioned to provide the BOP's quickest and most direct responses to contract compliance issues as they arise. The checklist has observation steps, which are instructions on how to document contractor performance requirements. However, we determined that observation steps for health services do not contain steps to verify that inmates receive a number of basic medical services. Also, while the BOP made revisions to the checklist in response to the findings of the OIG's Reeves County audit as discussed below, the revised checklist does not include observation steps to assess some vital

[57] See DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas, to Operate the Reeves County Detention Center I/II, Pecos, Texas*, Audit Report 15-15 (April 2015), iii.

functions in the contracts related to correctional services, such as conducting adequate searches and gathering intelligence.[58] In addition, for some functions, the checklist still contains vague observation steps. Further, onsite monitors at the contract prisons we visited did not use the checklist or monitoring logs to track contractors' corrective actions. Finally, the BOP lacks a review process for the checklist to ensure that observation steps accurately verify contract compliance. As a result, the BOP may not be able to monitor as effectively whether contract prisons comply with BOP policies and contract requirements on a day-to-day basis.

Observation Steps for Health Services Are Inadequate to Verify that Inmates Receive Basic Medical Services

To support the monitoring of contract compliance in health services, the BOP developed seven observation steps in the checklist for onsite monitors to verify that a contract prison's health services comply with its contract. At the time of this review, we determined that none of the seven health services checklist observation steps, individually or when considered together, examined whether the contractors were providing basic medical care to the inmates. Rather, the observation steps were primarily administrative procedures such as checking that biohazard procedures followed contractor policy, ensuring staff interactions with inmates were confidential, recording the percentage of inmates in chronic care, and checking that deceased inmates were properly fingerprinted. As a result, the BOP onsite monitors were not verifying each month whether inmates in contract prisons were receiving basic medical care.

Onsite monitors and PFAs told us they did not have the medical expertise to provide additional monitoring in health services beyond the observation steps in the checklist. They stated that the onsite monitor's position was intended to be that of a generalist, rather than a subject matter expert with the clinical knowledge needed to evaluate the quality of medical care provided. However, in the PMB Health Systems Specialist's (HSS) opinion, even without medical expertise, the onsite monitors could perform additional health services oversight steps to help ensure the contractors provide basic medical care.[59] The HSS is responsible for providing medical oversight training programs for PMB staff, as well as coordinating oversight of the contractors' medical services with the BOP's Contract Facility Monitoring (CFM) Branch and the Health Services Division (HSD), conducting annual reviews and site visits of contract prison medical departments, and providing clinical guidance in a written site visit report to help the contractors correct medical deficiencies. In June 2014, at an annual training conference attended by all PMB staff, the HSS trained the onsite monitors and PFAs on how they could verify whether inmates received basic medical care, such as an initial medical examination within 14 days of arrival at the prison, and whether they received immunizations,

[58] Appendix 3 provides sample observation steps from the health services and correctional services sections of the checklist that the onsite monitors use.

[59] In response to a working draft report, the BOP told us that the HSS whom we interviewed during the course of our review has since retired. The BOP stated that the new HSS has extensive experience in the review, analysis, and monitoring of healthcare provided to inmates.

tuberculosis tests, and chronic care appointments, all as required by BOP policy. The HSS stated that these verifications involve checking entries and corresponding dates in SENTRY and do not require any medical expertise.[60] However, the HSS told the OIG that there had been no discussion regarding whether the PMB could add these observation steps to the checklist, and he was not familiar with the checklist or its contents.

Following the OIG's 2015 report on the Reeves County contract prison, the BOP updated the checklist to include an observation step in the health services section that requires onsite monitors to run a chronic care roster in SENTRY to determine whether the contractor is current with follow-up care and appointments.[61] While the BOP has updated the checklist to include chronic care, the health services section of the checklist still does not include other steps that could help ensure basic medical care, such as verifying that initial examinations and immunizations are provided.

During our site visit to one contract prison, we learned there was no full-time physician, as required by its approved staffing plan, for the 8-month period between December 2013 and August 2014.[62] The dentist position was also vacant for approximately 6 weeks during this time. We found that despite these vacancies, which we believe are critical for ensuring basic inmate healthcare, the onsite monitor's checklists showed that the prison was in compliance with all health services observation steps. However, the BOP's annual CFM review at this prison in August 2014 resulted in a significant adverse finding in health services, with 11 deficiencies in administration and patient care, including 6 repeat deficiencies from the previous year.[63] The CFM results stated:

> There were inadequate controls in the clinical care and staffing area of Health Services to ensure compliance with established procedures and practices. These inadequacies create a lack of appropriate intervention, treatment, and programs to promote a healthy, safe, and secure environment. Many issues from previous [monitoring] have not

[60] SENTRY is the BOP's primary mission support database. It collects, maintains, and tracks critical inmate information, including location, medical history, behavior history, and release data. SENTRY does not currently track the dates of initial medical examinations and immunizations.

[61] The BOP's updated observation step on chronic care was not in response to a specific recommendation made in the OIG's 2015 audit of the Reeves County contract prison.

[62] The OIG also found medical understaffing in the 2015 audit of the Reeves County Detention Center. DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007*, 22–26. The report raised concerns that medical understaffing on the part of the contractor was financially incentivized because it cost the contractor less to pay penalty deductions for understaffing than to staff the prison adequately.

[63] Five of the six repeat deficiencies cited were for failure to provide medical appointments and treatment required by contract and BOP policy, and a sixth deficiency was for not conducting dental appointments as policy required.

been corrected. Medical needs and documentation were incomplete, including reports.[64]

Specific health services deficiencies cited in the CFM review included failing to provide prescribed antiviral therapy for inmates with hepatitis C, not following up with inmates with positive tuberculosis test results, missing preventive care evaluations and dental exams, and failing to provide some immunizations. During the period in which these deficiencies occurred, the checklists indicated that the prison was in compliance with all seven of the health services observation steps. However, none of the seven observation steps touched on the fundamental deficiencies cited by the CFM review. We believe that PMB should establish additional observation steps in the monitoring checklist to ensure inmates are receiving basic healthcare as required by the contract and to enable earlier identification of deficient inmate health services.

In response to a working draft of this report, the BOP provided the OIG with a copy of a new Health Services report that is generated quarterly by the HSS to provide documentation of any issues reported to the HSS pertaining to medical services at contract prisons, which occurred during the reporting period, and information regarding unresolved issues during prior reporting periods. According to the BOP, the purpose of the Health Services report is twofold. First, the report provides objective data of various areas in medical services over a specified time frame.[65] When sufficient data is collected, statistical analysis can detect significant trends and predict outcomes in contractor performance.[66] Second, the report provides detailed information regarding how each issue originated, progressed, and resolved.[67] Such information can be useful in retrospectively evaluating and potentially improving processes within health services. The BOP stated that the Health Services report is submitted to the Assistant Administrator of Field Operations within 30 days following the end of the quarter. The report is then distributed to all PMB Administrators. Any issues warranting contractor attention are discussed by the PFA and onsite monitors for appropriate action. Finally, the

[64] BOP Program Review Division, *Contract Facility Monitoring Final Report, Eden Detention Center* (August 2014), 3.

[65] The data sources for the quarterly reports include reports of BOP onsite staff (Senior Secure Institution Manager/Secure Oversight Monitor), contract staff, PFA reports, Office of Medical Designations, and HSS ad hoc reviews.

[66] The new Health Services report covers Active tuberculosis, Administrative Remedy Responses, Administrative Issues, Catastrophic Cases, Contract Facility Monitoring, Critical Vacancies, Deaths, Hunger Strike, Infectious Disease – Not associated with tuberculosis, Involuntary Treatment, Joint Commission Accreditation, Other Concerns – Not Otherwise Specified, Patient Care, Policy Updates, Reduction in Sentence, Restraints, Sentinel Events/Root Cause Analysis, Subject Matter Expert On-Site Visits, Transfer Requests/Form 770, and Transfer – Treatment Complete – Form 413. The total number of events for each category is calculated and subtotaled for each facility during the reporting period.

[67] The quarterly report provides a review of any CFM activity, as well as HSS follow-up visits, during the reporting period. Onsite monitors use the HSS site visit report to supplement their CFM follow-up report. The HSS site visit report provides medical-specific expertise to the CFM follow-up report.

BOP stated that a new tracking system was generated and the first HSS quarterly report was produced for the third quarter of 2015.

The Checklist Does Not Include Observation Steps to Address Some Vital Functions Related to Correctional Services in the Contract

While the BOP's annual CFM review provides a comprehensive annual audit of the contract prisons' compliance with BOP policy and contract requirements, onsite monitors use the checklist as a monitoring tool on a monthly basis to ensure contract prisons comply with BOP policy and contract requirements between annual audits. However, the checklist does not include observation steps to address policy requirements related to some of the vital functions in each contract. For example, one vital function in correctional services, which ensure the safety and security of the prison, states: "An adequate security inspection system is provided to meet the needs of the institution." We found that the only related observation step on the checklist does not adequately address this vital function.[68] The observation step states: "Include observation of staff routinely performing searches (use of metal detectors, pat searches at entrances/exits)." However, the checklist does not include any observation step to verify the contractor is performing searches required by BOP and contractor policies in other areas of the prison, including inmate housing units and cells, recreation, work and program areas, medical areas, and visiting areas, or that there is a comprehensive inspection system in place that ensures the safety and security of the prison.[69]

Also, there is no observation step to monitor the inmate urinalysis drug testing program. BOP policy requires that 5 percent of a prison's population be tested randomly each month. Specified inmate groups receive additional testing. For example, members of confirmed disruptive groups must be tested each month. Inmates who have been identified as suspects of prohibited acts, such as drug use, through intelligence gathering are supposed to be tested throughout an extended period of time, and inmates found to have committed prohibited drug-related acts are to be tested monthly for the subsequent 24 months.[70] Without consistent monitoring to ensure the testing is accomplished, the BOP cannot ensure that contract prisons comply with BOP policy on an ongoing basis. The annual CFM

[68] In response to a working draft of this report, the BOP stated that the vital function of ensuring security inspection systems can encompass an enormous number of functions and that the language in the checklist reflects this appropriately. The BOP also specified that there are two checklist steps to ensure security inspection systems are in place by the contractor. Additionally, the BOP stated that contract prisons are accredited by the ACA, which further requires the contractor to have a security inspection system in place.

[69] CCA Policy 09-05, Section 5(E) 1-2, for example, requires inmate cells to be searched randomly on a daily basis during each shift. ACA Standard 4-4192 (2014 supplement) requires that: "Written policy, procedure, and practice provide for searches of facilities and inmates to control contraband and provide for its disposition. These policies are made available to staff and inmates. The institution's search plans and procedures should include the following: unannounced and irregularly timed searches of cells, inmates, and work areas; inspection of all vehicular traffic and supplies coming into the institution; etc."

[70] BOP Program Statement 6060.08, Urine Surveillance and Narcotic Identification (November 24, 1999).

review does include monitoring of inmate urinalysis drug testing, as well as the security inspection system requirement discussed above, but we believe the BOP should consider adding observation steps on the monthly checklist to document compliance between CFM reviews.[71]

In addition, the checklist does not require onsite monitors to verify contract prisons' correctional services staffing levels. Correctional Officers ensure the safe and secure operation of the contract prisons. All contractors have a BOP-approved staffing plan and are required to meet certain staffing levels defined in each contract.[72] For correctional services, if contractors fall below a monthly average of 90 percent of the BOP-approved staffing plan, they are subject to deficiencies and financial deductions. However, there is no observation step to verify that the total number of Correctional Officers is consistent with the BOP-approved staffing plan. Given, for example, Correctional Officer leave, training, and part-time schedules, the actual staffing within contract prisons could fall below staffing levels as stated on monthly invoices. The PMB Administrator told us that this is an oversight activity that onsite staff could perform. We believe that adding an observation step to the checklist to periodically verify that the actual number of Correctional Officers is consistent with the BOP-approved staffing plan will ensure that staffing levels have not fallen below what is required to help ensure a safe and secure environment for staff and inmates.

In a response to a working draft of this report, the BOP stated that the PMB field staff reviews and certifies the monthly invoice and staffing reports that are submitted by the contractors. The invoice and certification memorandum are then reviewed for final certification by the PMB's Assistant Administrator, Support and Development, and routed for payment. The contractors' staffing reports indicate the number of required staff, the number of staff provided, and the percentage of staff provided based on the approved staffing plan. However, based on our review of a monthly invoice and staffing report provided by the BOP, we could not determine whether all staff on duty were actually Correctional Officers.[73] During

[71] In response to a working draft of this report, the BOP stated that intelligence gathering is a function obtained, tracked, and analyzed by PMB's two Intelligence Specialists. The PMB Intelligence Specialists remain in constant contact with the contractors' intelligence staff, who provide information related to disruptive groups, cell phone introduction, urinalysis testing, alcohol testing, phone monitoring, and use of force at all current contract locations. The information provided is compiled into a quarterly report that is shared with the PMB field staff. Additionally, the PMB Intelligence Specialists conduct monthly intelligence video conferences among PMB field staff to share intelligence.

[72] A staffing plan lists the number, type, and allocation of the contract prison's staff that is required to be maintained throughout the life of the contract. In addition, each contractor is required to maintain staffing level percentages in correctional services, health services, and all other departments. Appendix 1 provides more detail on staffing levels at each of the three prisons at the time of our review.

[73] Concerns regarding the verification of staffing levels were raised during our site visit to a contract prison. Some Corrections Counselors told us they were being asked to fill in as Correctional Officers in more than just temporary or relief roles, such as when Correctional Officers go to meals or to meetings. PMB onsite staff we interviewed at each contract prison we visited were not aware of such a practice, and we were unable to verify the Corrections Counselors' statements because PMB onsite monitors do not verify the approved staffing plan or the daily roster.

any 3-month period, if the contractor falls below the staffing requirement for 2 months, the PMB staff issues a deficiency.

The Checklist Contains Vague Observation Steps

We found several vague or repetitive observation steps on the checklist that resulted in inconsistent and insufficiently documented monitoring activities or responses by onsite monitors. For example, we found that the onsite monitors are supposed to determine whether trends exist in grievances and reports of incidents, but the steps do not describe how monitors are supposed to determine and analyze trends or over what timeframe the trends are to be analyzed. We reviewed 48 months of the onsite monitors' documentation of the observation steps in these two areas and found that onsite monitors generally record "no identifiable trends" or "no trends," or do not address trends at all. However, we performed trend analysis on reports of incidents and grievances the BOP collected to determine any significant differences in total numbers from FY 2011 through FY 2013 for the three contract prisons we visited. At one contract prison, we found that reports of incidents had increased 192 percent from FY 2011 through FY 2013, yet monitors in the facility had not reported or analyzed the trend. We believe that such limited responses from onsite monitors may be the result of unclear expectations for determining, analyzing, and documenting trends on a monthly oversight tool. However, we found it troubling that the PMB's Assistant Administrator told us that he does not think it is necessary for the PMB to look at long-term trends. While the BOP's primary responsibility is to monitor the contractor, identifying and analyzing trends is crucial to enabling the BOP to identify potential problem areas that could affect inmate safety and security, to enhance monitoring efforts in those specific areas, and to notify the contractor to promptly identify causes and solutions.

Another vague observation step states: "The contractor is responsible for the movement of inmates within a 400-mile radius of the contract facility. Observe actual process of inmate movement." The observation step includes examples of inmate transportation; however, there is no guidance on what specifically should be observed and how often or how many times it should be observed.[74]

We also found that, due to such vague observation steps, onsite monitors varied in how they documented their observations and PFAs had inconsistent expectations regarding how onsite monitors were to complete the observation steps to ensure the contractor is performing in accordance with BOP standards. We showed the three regional PFAs examples of onsite monitors' documentation regarding the inmate movement observation step and asked whether the documentation met their expectations. Each PFA had a different understanding and expectation for what the observation step required and what they believed would be adequate documentation from the onsite monitors. As a result, their

[74] Following the OIG's 2015 Reeves County audit report, the BOP revised this observation step to include the words, "to ensure procedures are in accordance with contractual and policy requirements" (see Appendix 3 of the current report). However, the BOP's revision still does not specify how often or how many times the movements should be observed.

assessment of the adequacy of the onsite monitor's responses varied, as did the rationale for those assessments, an example of which is shown in Table 4.

Table 4

Onsite Monitor Response to an Observation Step and PFA Expectations from Onsite Monitors

Observation Step	Onsite Monitor Response	PFAs		
		PFA 1	PFA 2	PFA 3
The contractor is responsible for the movement of inmates within a 400-mile radius of the contract facility. Observe actual process of inmate movement. Examples of inmate/ transportation include, but are not limited to, outside medical care, funeral and bedside trips, transfer or movement to/from other government facilities and airlift sites.	The contractor escorted nine inmates in medical trips during this observation period. The contractor is responsible for movement inside a 400-mile radius. The contractor has been making regular weekly scheduled transfers. The contractor also receives Self Surrenders.	The response is inadequate. The onsite monitor should observe an actual inmate movement.	The response is inadequate. The PFA would expect to see if policies were followed, if there were any concerns, and any security considerations.	The response is adequate because the onsite monitor recorded what they observed.

Sources: Large Secure Adult Contract Oversight Checklist and OIG interviews with PFAs

We also found observation steps that were repetitive. One observation step stated: "Review the results of internal/external audits conducted during this period. Determine if corrective action has been implemented as reported by contractor. This includes a sampling of corrective actions to the CFM, ACA, and corporate audits." Another observation step stated: "List all internal/external audits conducted this period." These two observation steps required onsite monitors to review the same audit documents. During the OIG audit of the Reeves County contract prison, auditors were told that having these duplicative observation steps was confusing to the monitors, with the result that the monitors did not fully complete the steps.[75]

In our 2015 audit report on the Reeves County contract prison, we recommmended that the BOP consider consolidating the two quality control observation steps in the checklist into a single observation step, as well as consider reviewing and updating guidance provided to PMB field staff to ensure the onsite monitors provided accurate and complete information in their monthly checklists. In response, the BOP combined the two repetitive observation steps into one observation step on the checklist and drafted guidance to PMB field staff to ensure that the checklist was accurate and complete. While the recommendation in the 2015 report did not ask the BOP to revise the whole checklist, the BOP chose to do

[75] DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007,* 30.

so. We believe that, although the BOP addressed the recommendation in the 2015 report by updating the checklist, it still should address some of the observation steps that are vague, such as how monitors are supposed to analyze trends and monitor inmate movement.

The BOP Lacks a Regular, Substantive Review Process for the Oversight Checklist to Ensure that Observation Steps Verify Contract Compliance

Although the checklist is one of the tools the PMB onsite staff uses to monitor contractor compliance and performance, it is not substantively reviewed on a regular basis to ensure that it is the most effective and efficient tool possible. We found that the PMB does not ensure its observation steps represent the most important activities that onsite monitors should observe to ensure contract compliance. The PMB Administrator told us that the PMB reviews the operating procedures annually and that the checklist is an attachment to those operating procedures. However, the PFAs stated that revisions to the checklist usually occur only in response to a significant incident. For example, one PFA said that in 2012 the PMB added an observation step to the checklist to require the onsite monitors to review video recordings of SHUs in the aftermath of a suicide in one contract prison. We found that the checklist was last updated in 2012 in response to this and other incidents at contract prisons and has not been updated since then.[76] As a result of the lack of regular, substantive review of the oversight checklist, the BOP cannot be certain that the observation steps in its primary onsite monitoring tool effectively verify contractor compliance.

In response to the Reeves audit report, the BOP updated the checklist and provided additional guidance to PMB field staff to ensure the checklist is filled out accurately and completely. Additionally, in response to a working draft of this report, the BOP stated that the regional PFA reviews the checklist monthly to ensure the onsite monitors complete each observation step. When comments or concerns arise, the PFA annotates such by the affected step.[77] PFAs present and address appropriate information obtained from checklist during weekly PMB Administrator meetings. While the BOP's action is commendable, we believe that the BOP should review the checklist regularly and proactively, rather than reactively, such as in response to a significant incident, to determine whether the observation steps need updating.

[76] A PFA told us that the PFAs and BOP management planned to discuss whether the contractors' quality control programs and the BOP's Quality Assurance Plan are doing what they want, including whether the observation steps in the checklist and onsite monitor responses to the observation steps are appropriate. The PMB planned to hold this discussion in December 2014 but delayed the meeting so that it could consider the results of this review during that process.

[77] The BOP provided the OIG with a copy of an annotated checklist. According to the BOP, there is no policy or guidance regarding the reviewing and revising of the checklist. The updating of the checklist is done on an as-needed basis.

Onsite Monitors at the Contract Prisons We Visited Did Not Use the Monitoring Logs to Track Contractors' Corrective Actions

When the BOP identifies deficiencies in contractor performance through CFM reviews or notices of concern (NOC), the contractor must submit a corrective action plan to the onsite monitors. The PMB operating procedures require onsite monitors to maintain monitoring logs to track and review the results of internal and external audits required by each contract. We found that onsite monitors in the three contract prisons we visited did not consistently use monitoring tools such as the monitoring logs to document whether the contractor had successfully corrected deficiencies identified by external audits.

Additionally, the onsite monitors received the results of the contractors' internal quality control audits but did not regularly document on the monitoring logs whether the contractors had corrected those deficiencies. One onsite monitor told us that he would take it as "gospel" if the contractor told him it had found and corrected deficiencies during its monthly internal audits.

Our 2015 report on the Reeves County contract prison found that onsite monitors were not using monitoring logs to document their monitoring and follow-up on the contractor's corrective actions. We recommended that the BOP take steps to ensure that PMB field staff at Reeves County document its follow-up efforts to ensure that the contractor's corrective actions are monitored and addressed in a timely manner. In response to the OIG's recommendations, the BOP has incorporated the functions of the monitoring log into the checklist to include an observation step for documenting follow-up efforts on corrective actions. We believe that the BOP's actions will help ensure the onsite staff tracks corrective actions consistently.

Monitoring of Health Services for Contract Compliance Lacks Coordination among BOP Staff Responsible for Health Services Oversight

One major area of concern with the BOP's monitoring of contract prison facilities is whether inmates are receiving adequate medical care. Four separate oversight activities regarding contract prison health services involve both medical and nonmedical specialists. These oversight activities are: (1) ongoing PMB onsite monitoring of contract compliance, including health services; (2) annual reviews by the PMB's HSS; (3) an annual CFM review, which includes a physician who evaluates the health services operations; and (4) contract physician mortality reviews of each contract prison inmate death when it occurs.[78] We found that communication between staff responsible for these oversight activities is limited, that they do not routinely share the results of the various reviews, and that no one person or office reviews the monitoring results. Additionally, while the onsite

[78] When an inmate dies in a contract prison, within 24 hours the contractor is required to conduct a mortality review and submit to the BOP a written report that includes a clinical synopsis of events leading up to the death. BOP policy then requires that a physician external to the BOP independently review the contractor's mortality review. The BOP's mortality reviews are the responsibility of the HSD.

monitors generally receive the results of the HSS and CFM reviews as well as the results of individual mortality reviews performed by the BOP's contract physician, we found that there are no procedures for them to require corrective action from the contractor when the BOP's contract physician identifies deficiencies during an individual mortality review. This resulted in deficiencies going uncorrected for extended periods. Accordingly, we determined that the BOP is unable to effectively identify problem areas among the contract prisons or contractors or to proactively take action before a problem becomes acute or systemic.

In order to ensure that inmates in contract facilities are getting appropriate healthcare, it is vital that health services information be shared among the PMB's onsite monitors, the Program Review Division's CFM physician, the PMB's HSS, and the BOP's contract physician in the HSD. The PMB's operating procedures state that "PMB staff is encouraged to maintain an open dialog with CFM staff and provide correspondence highlighting any problems or concerns." However, we identified instances in which health services information sharing was not occurring. For example:

- The HSS shares responsibility for coordination and oversight of the delivery of health services in contract prisons and, among other duties, is responsible for providing professional guidance to contract prison medical staff and developing procedures that describe how medical care of inmates is assessed, evaluated, and documented. However, we found that at the time of our review the HSS responsible for overseeing the delivery of health services in all of the contract prisons did not have input into the development of the health services observation steps in the checklist used by the onsite monitors; was unfamiliar with the checklist; and did not receive monthly copies of completed checklists from the onsite monitors.[79]

- The CFM physician and the BOP's contract physician both review the contractor's procedures and the circumstances surrounding inmate deaths at the contract prisons for the required mortality review. However, the CFM physician told the OIG that he is unsure whether the BOP's contract physician reviews all of his reports and he has never seen any of her reports.

Further regarding mortality reviews, we found that: (1) there are no procedures or guidance for the onsite monitors to require corrective action from the contractor when the BOP's contract physician identifies deficiencies and (2) the BOP's CFM physician, instead of the BOP's contract physician, was conducting the contract prisons' mortality reviews, which is inconsistent with the requirements in the contract. According to the contract, the BOP must have an external physician consultant to review all mortality records quarterly. The contract also states that, if

[79] In response to a working draft of this report, the BOP informed us that when the PMB revised the checklist following the OIG's 2015 report on the Reeves County contract prison, the HHS did provide input into the checklist revisions. The BOP further informed us that, "Any concerns identified by oversight staff regarding health services from the checklist steps are often discussed by field staff with the HSS and PFA to determine the level of non-compliance and what action(s) should be taken. All future revisions to the health services component on the checklist will include the HSS."

the external consultant (the BOP's contract physician) recommends improvement action, the contractor must address each recommendation and report any actions taken to the BOP Medical Director within 90 days of receiving the recommendations. When mortality reviews identified deficiencies, the reviewing CFM physician did not provide the onsite monitors with guidance on what corrective actions they should require from the contractor.[80] We found examples at both the Eden Detention Center and the Rivers Correctional Institution where the reviewing CFM physician had cited deficiencies, such as delayed or incomplete treatment, in the contractors' medical management or protocols surrounding an inmate death. In one instance, when an inmate had trouble breathing, the contract prison medical staff told him to place a sick call, which would put him on a list of inmates waiting to be seen by medical personnel instead of being treated immediately. However, after he died, the mortality reviews showing this deficiency gave the onsite monitors no guidance on what steps to take to require corrective action. As a result, contractor deficiencies went uncorrected and corrective actions were delayed at both facilities.[81] Delaying corrective action increases the likelihood that deficiencies identified in a mortality review could be repeated, thus putting other inmates at risk.[82]

We believe that the communication among the PMB, the Program Review Division, and the HSD needs to be improved, and that the roles of those responsible for ensuring health services are provided to federal inmates housed at contract prisons should be more clearly defined. Without proper information sharing and coordination in the oversight of health services at the contract prisons, there is the risk to inmates from healthcare deficiencies that may not be identified or addressed in a timely fashion, as well as a significant potential for wasted resources such as time and costs in the BOP's duplication of efforts. The latter may also result in the BOP paying for duplicate services or for services that are not actually provided.[83]

In response to a working draft of this report, the BOP stated that there is ongoing communication between those responsible for determining whether

[80] By contrast, when the CFM physician finds deficiencies related to inmate deaths during the annual CFM review, the onsite monitors must require corrective action from the contractor.

[81] An onsite monitor told us he had discussed the mortality review results with his supervisor, a PFA; but they decided not to issue a NOC because it was the reviewing physician's word against the contractor staff physician's and they did not have the medical expertise to judge between them. Rather, they decided to wait until the next annual CFM review for a determination of whether to require corrective action from the contractor.

[82] In response to a working draft of this report, the PMB Administrator told us that since April 2015 the CFM physician is no longer conducting the mortality reviews and that the contract physician is conducting all mortality reviews for both BOP institutions and contract prisons. The contract physician now writes recommendations for deficiencies found during the mortality review, as required by the statement of work. According to the BOP, the contract physician has conducted a total of six mortality reviews since April 2015. Of the six reviews conducted, one contained a recommendation.

[83] The Government Accountability Office (GAO) found that insufficient monitoring of corrective actions in BOP institutions leads to repeated deficiencies and significant findings that weaken the BOP's opportunity to maximize cost savings in correctional services. GAO, *Bureau of Prisons: Information on Efforts and Potential Options to Save Costs*, GAO-14-821 (September 2014) (accessed July 28, 2016).

healthcare requirements are being met in the BOP's contract prisons. The PMB Assistant Administrator, Field Operations, supervises the HSS and ensures CFM follow-up visits and quarterly reports are completed in a timely manner. The Assistant Administrator also provides guidance regarding PMB policy and operations, as well as administrative support, including travel and equipment authorizations. In addition, the HSS communicates freely with the HSD regarding any matters involving medical services at contract prisons.[84] The HSS reviews the CFM reports and working papers generated by the CFM physician and CFM Health Services Examiner. The HSS uses the CFM reports and working papers to focus the scope of the CFM follow-up site visits. The CFM staff is available to clarify any items in the CFM reports; however, according to the BOP, the need for clarification has been minimal since the CFM reports have proven to be thorough and unambiguous.

[84] The BOP stated that the HSS has worked closely with several staff in the HSD, including the Medical Director, Assistant Director, Senior Deputy Assistant Director, National Health Services Administrator, Assistant National Health Services Administrator, Chief of Quality Management, National Infection Control Consultant, Chief Social Worker, Chief Psychiatrist, Chief of Medical Designations, Regional Medical Director, Regional Quality Managers, Regional Social Workers, and Regional Counsel.

CONCLUSION AND RECOMMENDATIONS

Conclusion

The BOP's mission is to protect society by confining federal offenders in correctional facilities that are safe, humane, cost-efficient, and secure, and to provide reentry programming to ensure their successful return to the community. To carry out this mission, the BOP relies on contract prisons to house federal inmates and help alleviate overcrowding at its own institutions. To ensure these prisons house inmates in a safe and secure environment and that they comply with their contracts, the BOP has developed a multilayered approach to monitoring them.

In a majority of the categories we examined, we found that contract prisons incurred more safety and security incidents per capita than comparable BOP institutions and that the BOP could improve its contract monitoring efforts in several areas. Our analysis of data on safety and security indicators found that contract prisons had more incidents per capita than BOP institutions in three-quarters of the categories we examined. While the contract prisons had fewer positive inmate drug tests and sexual misconduct allegations than BOP institutions, they had more frequent incidents of contraband finds, assaults, uses of force, lockdowns, guilty findings on inmate discipline charges, and selected categories of grievances. Neither we nor the BOP know the extent to which demographic factors play a role in these differences; but, in order to ensure that federal inmates are housed in safe and secure facilities, the BOP should evaluate why contract prisons had more safety and security incidents in these categories and identify possible approaches for corrective action.

The three contract prisons we visited were all cited for one or more safety and security deficiencies during the review period. Because the contractors corrected the deficiencies the BOP had found, the BOP determined that the prisons were sufficiently compliant with the safety and security aspects of their contracts to continue their contracts with them. However, the BOP still must improve its oversight to ensure that federal inmates' rights and needs are not placed at risk when they are housed in contract prisons. We also found that contract prisons we visited housed new inmates in Special Housing Units, inconsistent with American Correctional Association standards and BOP policy. The OIG brought this to the BOP's attention, and the BOP immediately took corrective actions to address it.

In addition to the current review, in April 2015, the OIG issued an audit report on the Reeves County contract prison that included findings and recommendations related to the BOP's monitoring of all contract prisons. Throughout this report, we note several corrective actions the BOP has taken to improve its monitoring of contract prisons in response to the OIG's 2015 audit report, including in the areas of health and correctional services. We also note several steps the BOP has taken in response to concerns identified in that report. Commendable as these steps are, we identified in this review additional areas in the

BOP's monitoring of its contract prisons that could be improved. First, as a monitoring tool to ensure compliance with BOP policy and contract requirements, onsite monitors use the Large Secure Adult Contract Oversight Checklist (checklist) of observation steps related to each operational area established in the contact. However, the checklist does not address certain important policy and contract requirements in the areas of health and correctional services. For health services, the checklist does not include observation steps to verify that inmates receive a number of basic medical services. Similarly, for correctional services, the checklist does not include observation steps to address policy requirements related to some of the contracts' vital functions, such as providing an adequate security inspection system. Deficiencies related to contract prisons' security inspection systems could jeopardize the safety and security of inmates and prison staff, and the BOP should address them promptly.

Finally, we found that the checklist contains vague observation steps, which may cause confusion and may result in onsite monitors not fully completing the observation steps. With more specific observation steps and clearer expectations for how onsite monitors should document their observations, the BOP could better ensure accurate and consistent monitoring of each contract prison. Moreover, the BOP should review the checklist regularly and proactively, rather than reactively, such as in response to a significant incident, to reflect the most important activities for contract compliance and determine whether the observation steps need updating.

Recommendations

To ensure that the contract prisons are, and remain, a safe and secure place for housing federal inmates, we recommend that the BOP:

1. Convene a working group of BOP subject matter experts to evaluate why contract prisons had more safety and security incidents per capita than BOP institutions in a number of key indicators, and identify appropriate action, if necessary.

To improve monitoring and oversight of BOP contract prisons, we recommend that the BOP:

2. Verify on a more frequent basis that inmates receive basic medical services such as initial medical exams and immunizations.

3. Ensure that correctional services observation steps address vital functions related to the contract, including periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan.

4. Reevaluate the checklist and review it on a regular basis with input from subject matter experts to ensure that observation steps reflect the most important activities for contract compliance and that monitoring and documentation requirements and expectations are clear, including for observation steps requiring monitors to engage in trend analysis.

APPENDIX 1

METHODOLOGY OF THE OIG REVIEW

In this review, the OIG examined the BOP's monitoring of its 14 private contract prisons from FY 2011 through FY 2014. We also examined how the contractors performed in selected areas related to inmate safety and security and how the contract prisons compared to similar BOP institutions on those indicators. Our fieldwork, from April 2014 through February 2015, included interviews, site visits to three contract prisons, data analysis, and document reviews. The following sections provide additional information about our methodology.

Interviews

We interviewed 16 BOP officials and staff with roles in overseeing and monitoring contract prisons, as well as an external medical consultant. From the Correctional Programs Division's Privatization Management Branch (PMB), we interviewed the Administrator, an Assistant Administrator, two Intelligence Specialists, a Disciplinary Hearing Officer Specialist, a Health Services Specialist, and three Privatization Field Administrators. From the Program Review Division, we interviewed a Medical Officer. We also interviewed the Chief of the Quality Management Branch within the Health Services Division.

During our site visits, we interviewed five PMB onsite monitors and one Contracting Officer. The PMB briefed us on its role in managing and monitoring the contract prisons. We also interviewed 34 contract prison staff, including Wardens, Assistant Wardens, Chiefs of Security, intelligence staff, Special Housing Unit (SHU) staff, Disciplinary Hearing Officers, grievance coordinators, unit managers, counselors, case managers, compliance and quality assurance managers, and an interpreter. Finally, we interviewed 28 contract prison inmates, including 10 housed in SHUs at the time of our interviews.

Site Visits

We visited three contract prisons, one from each private contractor: Giles W. Dalby Correctional Facility (Management and Training Corporation (MTC)), Eden Detention Center (Corrections Corporation of America (CCA)), and Rivers Correctional Institution (GEO Group (GEO)). We selected our site visits based on a comparison of data analysis results from the 14 contract prisons for FY 2011 through FY 2013 (FY 2014 data was not yet available at the time of the site selection analysis). We requested and received from the BOP data in eight categories we considered indicators of prison safety and security:

1. contraband,
2. reports of incidents,[85]

[85] In this category we analyzed assaults by inmates on inmates, assaults by inmates on staff, sexual assaults by inmates on staff, deaths, fights, cell fires, suicide attempts and self-mutilation (combined), suicides, disruptive behavior, and uses of force.

3. lockdowns,
4. inmate discipline,
5. telephone monitoring,
6. grievances,
7. urinalysis drug testing, and
8. notices of concern (NOC).

We selected these categories of data to analyze as potential safety and security indicators because they provided information on areas addressed by American Correctional Association (ACA) standards on security and control, inmate rules and discipline, and inmate rights. Additionally, these data were tracked by the contract prisons.

For each type of data, we calculated monthly or annual averages per capita, then ranked the 14 contract prisons from the highest to lowest averages. Each prison that fell in the highest three averages on a measure was assigned three, two, or one points, respectively, for that measure based on whether it had the first, second, or third highest average. Additionally, we weighted some data categories that we deemed to be of greater significance for security by adding an additional point to those already given by the rankings (that is, those categories received four, three, or two points, respectively).[86] We then ranked each contract prison based on how many points it received and selected the contract prisons that received the most points from each of the three contractors for our site visits.

During the site visits, we toured the contract prisons, including the SHUs; interviewed staff and inmates; attended staff meetings; reviewed log books; and observed the activities of staff and inmates. Below is a brief profile of each contract prison at the time of our site visits.

Giles W. Dalby Correctional Facility (Dalby)

MTC operated the Dalby Correctional Facility in Post, Texas. As of the end of FY 2014, the prison housed an average of 1,800 inmates daily. The average age of inmates at Dalby was 38, and its average sentence length was 59 months. The top three inmate offenses at Dalby were drug trafficking (47 percent), immigration (47 percent), and violence (3 percent). At the time of our review, the staff-to-inmate ratio was 1:6 and the Correctional Officer ratio was 1:11. Dalby's overall staffing was at 92 percent; its Correctional Officer staffing was at 91 percent; and its medical staffing was at 90 percent. Dalby provided specialized vocational classes such as electrical trade, building trade, and computer-assisted drafting. Dalby offered inmate programs that exceeded the minimum requirement of its contract.

[86] The weighted categories were contraband, selected types of incident reports, lockdowns, discipline, selected types of grievances, positive drug tests, and NOCs.

Eden Detention Center (Eden)

CCA operated the Eden Detention Center in Eden, Texas. As of the end of FY 2014, the prison housed an average of 1,458 inmates daily. The average age of inmates at Eden was 39, and its average sentence length was 67 months. The top three inmate offenses at Eden were drug trafficking (48 percent), immigration (46 percent), and violence (3 percent). At the time of our review, the staff-to-inmate ratio was 1:6 and the Correctional Officer ratio was 1:9. Eden's overall staffing was at 89 percent; its Correctional Officer staffing was at 87 percent; and its medical staffing was at 78 percent. Specialized inmate programs included eyeglass repair, crocheting, and computer classes. Like Dalby, Eden offered inmate programs that exceeded the minimum requirement of its contract.

Rivers Correctional Institution (Rivers)

GEO operated the Rivers Correctional Institution in Winton, North Carolina. As of the end of FY 2014, the prison housed an average of 1,414 inmates daily. The average age of inmates at Rivers was 40, and its average sentence length was 86 months. The top three inmate offenses at Rivers were drug trafficking (43 percent), immigration (18 percent), and violence (20 percent). At the time of our review, the staff-to-inmate ratio was 1:4 and the Correctional Officer ratio was 1:9. Rivers' overall staffing was at 96 percent; its Correctional Officer staffing was at 94 percent; and its medical staffing was at 92 percent. Specialized inmate programs included commercial driver's license, building construction technology, and computer applications. In addition, Rivers offered a work program whereby inmates repaired used wheelchairs to be sent to people in need around the world. Since Rivers housed inmates to be released and returned to the Washington, D.C., area, it also had reentry and drug abuse programs. Like Dalby and Eden, Rivers offered inmate programs that exceeded the minimum requirement of its contract.

Data Analysis

We analyzed security-related data from the 14 contract prisons and a select group of 14 comparable BOP institutions to evaluate how the contract prisons performed relative to the selected BOP institutions. The comparable BOP institutions housed male inmates with the same security level (low), similar population sizes, and similar geographical locations as the 14 contract prisons.[87] For our comparison, we used BOP institutions in the following locations:

- Allenwood (Pennsylvania),
- Bastrop (Texas),
- Beaumont (Texas),
- Big Spring (Texas),
- Butner (North Carolina),

[87] Most of the contract prison inmates were criminal aliens, and many were serving time for immigration offenses; most of the inmates in the BOP institutions were U.S. citizens.

- Elkton (Ohio),
- Forrest City (Arkansas),
- La Tuna (Texas),
- Loretto (Pennsylvania),
- Oakdale (Louisiana),
- Seagoville (Texas),
- Terminal Island (California),
- Texarkana (Texas), and
- Yazoo City (Mississippi).

To conduct our analysis, we requested from the BOP eight categories of data from FY 2011 through FY 2014:

1. contraband,
2. reports of incidents,[88]
3. lockdowns,
4. inmate discipline,
5. telephone monitoring,
6. grievances,
7. urinalysis drug testing, and
8. sexual misconduct.

We selected these categories of data to analyze as potential safety and security indicators because they provided information on areas addressed by ACA standards on security and control, inmate rules and discipline, and inmate rights, and because these data were tracked by both the contract prisons and the BOP institutions.

For the contract prisons, a primary source of data for monthly inmate population snapshots, cell phone confiscations, reports of incidents, telephone monitoring, and urinalysis drug testing was the PMB Special Investigative Supervisor Monthly Tracking and Monitoring Report, which consolidated the monthly intelligence reports the individual contract prisons submitted to the PMB. The individual contract prisons provided data to the BOP on confiscations of contraband drugs, tobacco, and weapons; lockdowns; and grievances. The BOP provided information on BOP institutions and on inmate discipline in both BOP and contract prisons. Its sources included SENTRY, TRUINTEL (for confiscations of contraband drugs, tobacco, and weapons), and its annual Cell Phones Recovered reports (for confiscations of contraband cell phones). The BOP's Office of Internal Affairs provided data on allegations of sexual misconduct by staff against inmates for both the contract prisons and the BOP institutions.

Since the contract prisons and BOP institutions had a range of inmate population sizes that varied from month to month, we adjusted for these population

[88] The specific types of reports of incidents we analyzed in this category included assaults by inmates on inmates, assaults by inmates on staff, sexual assaults by inmates on staff, deaths, fights, cell fires, suicide attempts and self-mutilation (combined), suicides, disruptive behavior, and uses of force.

differences by calculating rates per capita where possible. As of September 2014, the combined inmate population of the 14 contract prisons was 27,987 and the combined population of the 14 BOP institutions was 22,562. In most cases we calculated the average annual rate per capita, or, where monthly data was available, the average monthly rate per capita. Since the per capita figures often ranged from .001 to .00001, except where otherwise noted in the body of the report, we give per capita rates per 10,000 inmates to present the numbers in an accessible format. In some cases we also provided total numbers unadjusted for population differences to give the reader additional perspective on the scope of the data we analyzed.

To perform the analysis, we calculated both summary and average monthly or annual per capita figures for each prison, the aggregate for both contract prisons and BOP institutions, and the same figures for all contract prisons by each of the three contractors. We also compared the data analysis results between individual contract prisons by examining how often each prison fell in the highest or lowest three on each indicator. To calculate the averages per capita, we used monthly and annual population snapshot data the BOP provided for each contract prison and BOP institution. To calculate percentage differences between various indicators for our comparisons between the contract prisons and BOP institutions, we used a standard formula to divide the difference between the two numbers by their average. That is, where the first value is x and the second value is y, we used the formula $[(x-y)/([x+y]/2)]*100$. We present the results of the analysis in the color-coded Table 8 in Appendix 7. In Table 8, we designate as "roughly equal" those indicators where the average difference per 10,000 inmates times the number of months or years comprised less than 5 percent of the total number of occurrences over the 4-year period.

Document Review

We reviewed BOP and contractor documents, including the contracts established between the BOP and each contractor, program statements, policy documents, operating procedures, quality assurance plans, quality control plans, monthly intelligence reports, personnel position descriptions, performance work plans, contractor staffing plans, and Contractor Performance Assessment Reporting System reports. We also reviewed BOP onsite contract monitoring documents including monthly checklists, monthly performance meeting minutes, monthly logs, annual and semiannual performance reports, contractor self-assessments, Contract Facility Monitoring (CFM) reports, NOCs, letters of inquiry, and summaries of corrective actions in response to CFM deficiencies and NOCs. From the contract prisons, we reviewed sample reports of incidents, use-of-force after-action reports, contractor internal audit reports, inmate grievances, grievance logs and grievance summary reports, Disciplinary Hearing Officer reports, discipline logs, SHU reports, SHU logs, intelligence meeting minutes, and institutional intelligence reports. Finally, in the area of health services, we reviewed screenshots and tutorials from electronic recordkeeping systems, mortality reviews for contract prison inmate deaths, and CFM working papers.

APPENDIX 2

CONTRACT PERFORMANCE REQUIREMENTS AND VITAL FUNCTIONS

Table 5 lists each contract requirement and the vital functions essential to successful performance, summarizes the vital functions, and specifies the percentage of total contract value attributable to each contract requirement.

Table 5

Performance Requirements Summary

CONTRACT REQUIREMENT:	**ADMINISTRATION (Quality Control)**	**10%**
Vital Function #1	The contractor's Quality Control Program serves to identify deficiencies in the quality of services throughout the entire scope of the contract and implements corrective action before the level of performance becomes deficient.	

CONTRACT REQUIREMENT:	**CORRECTIONAL PROGRAMS (Unit/Case Management, Grievance Procedures)**	**10%**
Vital Function #2	Inmates are appropriately classified and managed commensurate with security and custody requirements to promote institution and public safety.	
Vital Function #3	Staff evaluates the needs of inmates and manages their program participation.	
Vital Function #4	Staff is accessible and communicates effectively with inmates to promote positive institutional adjustment.	
Vital Function #5	A program for inmate grievances exists, which provides for the expression and resolution of inmate problems.	

CONTRACT REQUIREMENT:	**CORRECTIONAL SERVICES (Security/Control/Inmate Accountability/ Computer Security and Information Systems)**	**20%**
Vital Function #6	A safe and secure environment is provided for staff and inmates through effective communication of operational concerns. This includes verbal and written instructions, post orders, institution supplements, information dissemination, training, and crisis prevention.	
Vital Function #7	Intelligence information related to security concerns is gathered for dissemination to appropriate contract and BOP staff.	
Vital Function #8	An adequate security inspection system is provided to meet the needs of the institution.	
Vital Function #9	An adequate level of emergency readiness is maintained to respond to institution emergencies.	
Vital Function #10	Appropriate operational and security requirements applicable to all computer and information systems are maintained.	

CONTRACT REQUIREMENT:	**FOOD SERVICE**	**15%**
Vital Function #11	Policy, procedures, and practices are in place for a safe, secure, and sanitary environment.	
Vital Function #12	Meals are nutritionally adequate, properly prepared, and attractively served.	
Vital Function #13	Policy, procedures, and essential resources are identified, developed, and managed to meet the operational needs of the Food Service Program.	

Table 5 (Cont'd)

CONTRACT REQUIREMENT:	HEALTH SERVICES	15%
Vital Function #14	Open access to healthcare is provided for all inmates in an environment that is safe and secure.	
Vital Function #15	Quality healthcare is provided utilizing qualified personnel and resources in accordance with applicable standards.	
Vital Function #16	Health information data is recorded accurately, legibly, in a timely manner and maintained in accordance with applicable BOP policy.	
Vital Function #17	All inmates are screened for mental health, substance abuse, and other behavioral problems and receive appropriate intervention, treatment, and programs to promote a healthy, safe, and secure environment.	

CONTRACT REQUIREMENT:	HUMAN RESOURCES	10%
Vital Function #18	Adequate staffing levels are maintained.	
Vital Function #19	Staff resources are properly administered and managed.	
Vital Function #20	All resources are managed to ensure training requirements and needs are provided.	

CONTRACT REQUIREMENT:	INMATE SERVICES (Commissary/Laundry/Telephone/Trust Fund)	15%
Vital Function #21	Inmates are provided the privilege of an inmate telephone system and obtaining merchandise through the operation of a commissary. Effective security measures are in place to prevent misuse of the telephone system.	
Vital Function #22	Inmate funds and property are properly maintained and accounted for during incarceration.	
Vital Function #23	Clothing, linens, toiletries, and laundry services are provided to inmates.	
	(Education and Recreation Programs)	
Vital Function #24	The needs of the inmate population are evaluated and General Educational Development, English as a Second Language, and recreational programs are provided. Programs are accessible for the inmate population, and program availability is communicated.	
	(Mail/Receiving and Discharge/Records)	
Vital Function #25	The institution provides inmate mail services, which include timely processing and accountability of funds, special mail, and general correspondence. Special care is given to the detection of contraband and prohibited acts.	
Vital Function #26	Inmates are lawfully committed and processed in a safe and secure environment, with emphasis on the detection and elimination of contraband from their persons and property.	
Vital Function #27	The appropriate execution, processing, and verification of documents are performed to ensure the accurate and timely release of inmates.	
	(Religious Services)	
Vital Function #28	Impartial religious leadership is provided through resources and programs to accommodate the free exercise of religion and diverse needs of inmates.	

CONTRACT REQUIREMENT:	SAFETY AND ENVIRONMENTAL HEALTH/FACILITIES	5%
Vital Function #29	All facilities are safely operated and maintained in accordance with applicable laws, codes, and regulations.	

Source: BOP

APPENDIX 3

LARGE SECURE ADULT CONTRACT OVERSIGHT CHECKLIST OBSERVATION STEPS IN CORRECTIONAL AND HEALTH SERVICES

Table 6

Observation Steps in Correctional Services and Health Services

No.	Sample Correctional Services Observation Steps
(1)	Observe to determine if the contractor is providing perimeter security in accordance with the contract.
(2)	Observe SHU [special housing unit] procedures during all three shifts and compare observations to contractor policy, practices, procedures, i.e., movement of inmate in appropriate restraints, property allowances, security practices, and visits by required staff.
(3)	The contractor is responsible for the movement of inmates within a 400-mile radius of the contract facility. Observe actual process of inmate movement to ensure procedures are in accordance with contractual and policy requirements. Examples of inmate/ transportation include, but are not limited to, outside medical care, funeral and bedside trips, transfer or movement to/from other government facilities, and airlift sites.
(4)	Observe vehicle sally port operations to determine if they are consistent with the contractor's policy and procedure manual.
(5)	Observe contractor's procedures for processing incoming packages and boxes to ensure they are in accordance with local policy.
No.	**All Health Services Observation Steps**
(1)	Observe access to health records and verify that access is controlled by the health authority.
(2)	In the event of an inmate death: A. Did the contractor immediately notified BOP and submitted a written report within 24 hours, B. Did the contractor obtained fingerprints of the deceased (right thumb or right index and dated & signed the fingerprint card and hand delivered the fingerprint card to the COR. C. If death is due to violence, accident surrounded by unusual or questionable circumstances, or is sudden and the deceased has not been under immediate medical supervision did the contractor notify the coroner of the local jurisdiction to request review of the case, and if necessary, examination of the body. D. Review contractor's records to determine if the deceased inmate's property was inventoried & forwarded to the designated family member, the nearest of kin, or the Consular Officer of the inmate's country of legal residence. **Note: SSIM shall track the timely submission of the contractor's mortality review and follow up to ensure a response is received from Health Services Division.**
(3)	Review any allegations of sexual abuse/assault to ensure the procedures followed were in accordance with the BOP program statement. (Reported via 583, Sentry assignments keyed, follow ups conducted timely, etc)

Table 6 (Cont'd)

No.	All Health Services Observation Steps (Cont'd)
(4)	Observe inmates housed in observation cells or cells in medical and determine if the: A. Logs are maintained in accordance with contractor's policy? B. Inmates are receiving services in a timely manner (i.e., food service, hospital rounds, etc.)? C. Inmates on suicide watch are supervised in accordance with local procedures?
(5)	Observe Health Services staff interactions with inmates to determine if inmates are being afforded confidentiality, supervision in medical, etc.
(6)	Check bio-hazard procedures to ensure they are in accordance with contractor's policy.
(7)	Run a Chronic Care roster (SMDG eq N***/Column #4 SELD, #5 ARSD/Seq 4) Determine if contractor is current with follow up care and appointments – any dates are past due.

Note: At the time of our review, the complete checklist contained nearly 70 observation steps in 8 categories, including the correctional services and health services steps listed here. The BOP revised some of the observation steps in the checklist in response to the 2015 OIG audit on the Reeves County contract prison. The red text above reflects some of the BOP's revisions.

Source: BOP

APPENDIX 4

THE OIG'S MEMORANDUM TO THE BOP ON THE HOUSING OF NEW INMATES IN SPECIAL HOUSING UNITS

U.S. Department of Justice

Office of the Inspector General

July 28, 2014

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

CHARLES E. SAMUELS, JR.
DIRECTOR
FEDERAL BUREAU OF PRISONS

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Housing of New Inmates in BOP Contract Institutions' Special Housing Units for Extended Periods

In course of the ongoing review by the Office of the Inspector General (OIG) of the BOP's management of its private prison contracts, OIG staff recently visited two private contract facilities. During those visits, the OIG learned that both facilities were regularly housing newly received general population inmates in Special Housing Units due to space limitations in the general population. We further learned that these inmates are kept in Special Housing Units for extended periods of time until beds are available in the general population.

On July 8, 2014, an OIG review team visited the Giles W. Dalby Correctional Facility (Dalby) in Post, Texas. We found that all new inmates are placed directly in Administrative Segregation in the Special Housing Unit for an average of 20 days, pending available bed space in the general population.

On July 14, 2014, our review team visited the Eden Correctional Institution (Eden) in Eden, Texas, and learned from institution staff that the same practice was occurring there. As of July 16, 2014, 71 of 100 inmates in the Special Housing Unit were new inmates awaiting a bed in the general population. According to the Warden, new inmates at Eden spend an average of 25 days in the Special Housing Unit waiting for beds in the general population.

Institution management and staff at both Dalby and Eden told us that these new inmates did not engage in any conduct that warranted their placement in the Special Housing Unit. Thus, even though these new inmates have not been determined to pose a threat to themselves, other inmates, or to

the security of the institution, they are subject to the same security measures as inmates who have been assigned to Administrative Segregation for specific, security-related reasons. These security measures include limiting telephone calls and all program services available in the general population due to the restrictive physical design and location of a segregation unit.

According to institution management and BOP staff, the private contract institutions are housing new inmates in the Special Housing Units because both the BOP and its contractors have interpreted language in their contracts as permitting Special Housing Unit beds to be counted as part of the general population bed count, rather than as a separate category. Moreover, Eden's Statement of Work within the contract states, "The contractor does not have a right of refusal and shall accept all designations from the BOP."[1] We have been told that the BOP sends new inmates to Eden because they appear to have available beds even though they are actually in a Special Housing Unit, and the contract institution cannot refuse to accept these new inmates.

While this practice may not be a violation of the BOP contract, Wardens at both Dalby and Eden told us that it is not good correctional practice. Moreover, the American Correctional Association (ACA), which must accredit contract institutions, states that special management units such as Special Housing Units are appropriate for "inmates who threaten the secure and orderly management of the institution."[2] The ACA does not recognize the use of Administrative Segregation to house new general population inmates due to a lack of bed space in the general population.[3]

We are providing this information to the Department and BOP leadership so that it can consider whether to undertake corrective action while our review is ongoing. Please advise us within 60 days of the date of this memorandum of any actions the Department has taken or intends to take regarding the issues discussed in this memorandum. If you have any questions or would like to

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[1] Contract facilities operate according to a Statement of Work or a Performance Work Statement that outlines the requirements for operating under the contract.

[2] *Standards for Adult Correctional Institutions*, 4th edition, American Correctional Association (July 1, 2003), p. 69.

[3] ACA Standard 4-4249 states, "When segregation units exist, written policy and procedure govern their operation for the supervision of inmates under administrative segregation, protective custody, and disciplinary detention." The ACA describes segregation as encompassing "administrative segregation, protective custody, and disciplinary detention." It defines administrative segregation as a special unit where inmates are placed because their "continued presence in the general population poses a serious threat to life, liberty, self, staff, or other inmates, or to the security or orderly running of the institution."

discuss the information in the memorandum, please contact me at (202) 514-3435.

cc: Carla Wilson
Chief of Staff
Federal Bureau of Prisons

Sara M. Revell
Assistant Director
Program Review Division
Federal Bureau of Prisons

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Richard P. Theis
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Internal Review and Evaluation Office
Justice Management Division

APPENDIX 5

THE BOP'S RESPONSE TO THE OIG'S MEMORANDUM ON THE HOUSING OF NEW INMATES IN SPECIAL HOUSING UNITS

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director *Washington, D.C. 20534*

August 8, 2014

MEMORANDUM FOR MICHAEL E. HOROWITZ
INSPECTOR GENERAL
OFFICE OF INSPECTOR GENERAL

FROM: Charles E. Samuels, Jr.
Director
Federal Bureau of Prisons

SUBJECT: Response to the Office of Inspector General's (OIG) Request for Corrective Action Regarding Housing of New Inmates in BOP Contract Institutions' Special Housing Units for Extended Periods

I have received your memorandum dated July 28, 2014, regarding Housing of New Inmates in BOP Contract Institutions' Special Housing Units for Extended Periods. I take this matter very seriously and am pleased to provide you with the following information about the steps I have taken to assess and correct the problems you have identified.

The facilities referenced in your letter, specifically, Giles W. Dalby Correctional Facility and Eden Detention Center, house many inmates serving short sentences and there are many inmates transferring in and out daily. I have verified that new commitments were often placed in the Special Housing Unit (SHU) for a short period immediately upon arriving at the prison (the stay in SHU generally did not exceed 25 days).

All inmates have been removed from SHU in the 14 private prisons other than those who are subject to administrative detention or disciplinary segregation. These inmates are now housed in a general population environment. Moreover, we have stopped all movement into the privates if such movement would have resulted in placement in SHU. Nine of the 14 contracts were in

compliance prior to your letter and on August 1, 2014; the remaining five contracts were unilaterally modified to address this issue. Finally, all 14 contracts are now in compliance and prohibit SHU placement for inmates unless there is a need and a policy based reason to house them in administrative detention or disciplinary segregation.

A Senior Secure Institution Manager, a Secure Oversight Monitor, and a Contracting Officer are on-site at each private facility and will ensure contract compliance by conducting ad-hoc, systematic, and other reviews of on-site operations, especially regarding the placement of inmates in SHU.

I am confident these measures will address the concerns noted in your correspondence. If you require additional information, please contact me at (202) 307-3250.

cc: James M. Cole
Deputy Attorney General

APPENDIX 6

COMPARISON OF SECURITY INDICATORS AMONG CONTRACTORS

Table 7

Comparison of Security Indicators among Contractors FY 2011 – FY 2014

KEY	
Red	The Corrections Corporation of America's (CCA) contract prisons had a higher rate on this indicator (or, for telephone monitoring and drug testing, a lower average percentage).
Purple	The GEO Group's (GEO) contract prisons had a higher rate on this indicator (or, for telephone monitoring and drug testing, a lower average percentage).
Blue	The Management and Training Corporation's (MTC) contract prisons had a higher rate on this indicator (or, for telephone monitoring and drug testing, a lower average percentage).

INDICATOR		CONTRACTOR		
		CCA	**GEO**	**MTC**
		Adams County, Cibola, Eden, McRae, Northeast Ohio	Big Springs, D. Ray James, Moshannon Valley, Reeves I & II, Reeves III, Rivers	Dalby, Taft, Willacy
Contraband				
Cell Phones	Annual Average Confiscations per 10,000 Inmates	314.6	**462.1**	31.3
Drugs	Monthly Average Confiscations per 10,000 Inmates	1.4	**2.4**	1.3
Weapons	Monthly Average Confiscations per 10,000 Inmates	2.3	3.2	**5.0**
Tobacco	Monthly Average Confiscations per 10,000 Inmates	0.8	**4.8**	0.7

Table 7 (Cont'd)

INDICATOR		CONTRACTOR		
		CCA	GEO	MTC
		Adams County, Cibola, Eden, McRae, Northeast Ohio	Big Springs, D. Ray James, Moshannon Valley, Reeves I & II, Reeves III, Rivers	Dalby, Taft, Willacy
Reports of Incidents				
Assaults by Inmates on Inmates	Monthly Average per 10,000 Inmates	**4.1**	3.6	1.5
Assaults by Inmates on Staff	Monthly Average per 10,000 Inmates	3.7	**6.0**	1.3
Sexual Assaults by Inmates on Staff	Monthly Average per 10,000 Inmates	**0.15**	0.07	0.11
Deaths	Monthly Average per 10,000 Inmates	0.3	0.4	**0.5**
Fights	Monthly Average per 10,000 Inmates	**5.4**	3.7	1.7
Setting a Fire	Monthly Average per 10,000 Inmates	0.1	**0.2**	0.1
Suicide Attempts and Self-mutilation	Monthly Average per 10,000 Inmates	**1.1**	1.0	0.5
Suicides	Monthly Average per 10,000 Inmates	0.055	0.000	**0.064**
Disruptive Behavior	Monthly Average per 10,000 Inmates	1.0	**3.1**	0.5
Uses of Force (Immediate and Calculated)	Monthly Average per 10,000 Inmates	4.3	**5.9**	1.8
Lockdowns				
Full and Partial Lockdowns	Total per Prison	7.6	**9.5**	2

Table 7 (Cont'd)

INDICATOR		CONTRACTOR		
		CCA	GEO	MTC
		Adams County, Cibola, Eden, McRae, Northeast Ohio	Big Springs, D. Ray James, Moshannon Valley, Reeves I & II, Reeves III, Rivers	Dalby, Taft, Willacy
Discipline				
Guilty Findings on Serious (100- and 200-Level) Disciplinary Incident Report Charges	Monthly Average per 10,000 Inmates	70.7	**92.1**	60.2
Telephone Monitoring				
Inmate Phone Calls Monitored	Monthly Average Percentage of Calls Monitored	8.7%	7.6%	**5.8%**
Grievances				
All Grievances	Monthly Average Submitted per 10,000 Inmates	48.6	74.4	**111.5**
Grievances in Selected Safety and Security Categories	Monthly Average Submitted per 10,000 Inmates	18.4	28.2	**65.6**
Complaints about Staff	Monthly Average Submitted per 10,000 Inmates	7.1	9.6	**30.3**
Conditions of Confinement	Monthly Average Submitted per 10,000 Inmates	0.2	1.8	**3.2**
Food	Monthly Average Submitted per 10,000 Inmates	1.0	1.9	**4.5**
Institutional Operations	Monthly Average Submitted per 10,000 Inmates	0.0	0.9	**3.6**
Medical and Dental Grievances	Monthly Average Submitted per 10,000 Inmates	9.6	13.9	**23.5**

Table 7 (Cont'd)

INDICATOR		CONTRACTOR		
		CCA	GEO	MTC
		Adams County, Cibola, Eden, McRae, Northeast Ohio	Big Springs, D. Ray James, Moshannon Valley, Reeves I & II, Reeves III, Rivers	Dalby, Taft, Willacy
Grievances (Cont'd)				
Safety and Security	Monthly Average Submitted per 10,000 Inmates	**0.5**	0.04	0.0
Special Housing Unit	Monthly Average Submitted per 10,000 Inmates	0.03	0.1	**0.5**
Urinalysis				
Percentage of Inmates Tested	Monthly Average Percentage Tested	7.5	7.0	**6.4**
Positive Drug Tests	Monthly Average per 10,000 Inmates	2.0	**2.3**	1.6
Sexual Misconduct				
Allegations of Staff Sexual Misconduct against Inmates	Annual Average per 10,000 Inmates	7.3	**10.3**	7.7
Guilty Findings on Disciplinary Incident Charges of Inmate Sexual Misconduct against Inmates	Annual Average per 10,000 Inmates	10.4	**24.3**	11.7

Source: OIG analysis of BOP and contractor data

APPENDIX 7

COMPARISON OF SECURITY INDICATORS BETWEEN CONTRACT PRISONS AND BOP INSTITUTIONS

Table 8

Comparison of Security Indicators between Contract Prisons and BOP Institutions FY 2011 – FY 2014

KEY	
Purple	Contract prisons had a higher rate on this indicator (or, for telephone monitoring and drug testing, a lower average percentage).
Blue	BOP institutions had a higher rate on this indicator (or, for telephone monitoring and drug testing, a lower average percentage).
Green	Contract prisons and BOP institutions were roughly equal on this indicator. (See Appendix 1 for a further explanation of our criteria for determining this.)

INDICATOR		CONTRACT PRISONS	BOP INSTITUTIONS
Contraband			
Cell Phones	*4-year Total*	*4,849*	*400*
	Annual Average Confiscations per 10,000 Inmates	**317.1**	38.3
Drugs	*4-year Total*	*220*	*330*
	Monthly Average Confiscations per 10,000 Inmates	1.8	**3.0**
Tobacco	*4-year Total*	*397*	*214*
	Monthly Average Confiscations per 10,000 Inmates	**2.5**	1.9
Weapons	*4-year Total*	*418*	*206*
	Monthly Average Confiscations per 10,000 Inmates	**3.2**	1.8

Table 8 (Cont'd)

INDICATOR		CONTRACT PRISONS	BOP INSTITUTIONS
Reports of Incidents			
Assaults by Inmates on Inmates	*4-year Total*	*423*	*289*
	Monthly Average per 10,000 Inmates	**3.3**	2.5
Assaults by Inmates on Staff	*4-year Total*	*526*	*184*
	Monthly Average per 10,000 Inmates	**4.2**	1.6
Sexual Assaults by Inmates on Staff	*4-year Total*	*13*	*2*
	Monthly Average per 10,000 Inmates	**0.1**	0.02
Deaths	*4-year Total*	*54*	*127*
	Monthly Average per 10,000 Inmates	0.4	**1.2**
Fights	*4-year Total*	*459*	*465*
	Monthly Average per 10,000 Inmates	**3.9**	**4.0**
Setting a Fire	*4-year Total*	*20*	*5*
	Monthly Average per 10,000 Inmates	**0.1**	0.04
Suicide Attempts and Self-Mutilation	*4-year Total*	*125*	*89*
	Monthly Average per 10,000 Inmates	**0.9**	**0.8**
Suicides	*4-year Total*	*4*	*4*
	Monthly Average per 10,000 Inmates	**0.03**	**0.03**
Disruptive Behavior	*4-year Total*	*256*	*274*
	Monthly Average per 10,000 Inmates	1.8	**2.4**
Uses of Force (Immediate and Calculated)	*4-year Total*	*548*	*455*
	Monthly Average per 10,000 Inmates	**4.5**	3.8

Table 8 (Cont'd)

INDICATOR		CONTRACT PRISONS	BOP INSTITUTIONS
Lockdowns			
Full and Partial Lockdowns	*4-year Total*	**101**	11
	Number of Facilities with Lockdowns	**12**	6
Inmate Discipline			
Guilty Findings on Serious (100- and 200-Level) Disciplinary Incident Report Charges	*4-year Total*	*10,089*	*7,439*
	Monthly Average per 10,000 Inmates	**77.9**	64.7
Telephone Monitoring			
Inmate Phone Calls Monitored	Monthly Average Percentage of Calls Monitored	**7.6%**	21.1%
Grievances			
All Grievances	*4-year Total*	*8,756*	*14,098*
	Monthly Average Submitted per 10,000 Inmates	72.6	**121.5**
	Percent Granted	8.1%	5.2%
Grievances in Selected Safety and Security Categories	*4-year Total*	*3,969*	*2,883*
	Monthly Average Submitted per 10,000 Inmates	**32.2**	25.3
Complaints about Staff	*4-year Total*	*1,538*	*719*
	Monthly Average Submitted per 10,000 Inmates	**12.9**	6.2
Conditions of Confinement	*4-year Total*	*161*	*134*
	Monthly Average Submitted per 10,000 Inmates	**1.5**	1.2
Food	*4-year Total*	*247*	*133*
	Monthly Average Submitted per 10,000 Inmates	**2.1**	1.2

Table 8 (Cont'd)

INDICATOR		CONTRACT PRISONS	BOP INSTITUTIONS
Grievances (Cont'd)			
Institutional Operations	*4-year Total*	*171*	*20*
	Monthly Average Submitted per 10,000 Inmates	**1.1**	0.2
Medical and Dental	*4-year Total*	*1,800*	*1,609*
	Monthly Average Submitted per 10,000 Inmates	**14.3**	**14.1**
Safety and Security (Contract Prisons Only)	*4-year Total*	*25*	*N/A*
	Monthly Average Submitted per 10,000 Inmates	**0.2**	**N/A**
Sexual Abuse or Assault (BOP Institutions Only)	*4-year Total*	*N/A*	*9*
	Monthly Average Submitted per 10,000 Inmates	**N/A**	**0.07**
Special Housing Unit	*4-year Total*	*27*	*259*
	Monthly Average Submitted per 10,000 Inmates	0.2	**2.4**
Urinalysis Drug Tests			
Percentage of Inmates Tested	Monthly Average	**7.1**	8.1
Positive Drug Tests	*4-year Total*	*263*	*376*
	Monthly Average per 10,000 Inmates	2.1	**3.4**
Sexual Misconduct			
Guilty Findings on Disciplinary Incident Charges of Inmate Sexual Misconduct against Inmates	*4-year Total*	*156*	*175*
	Annual Average per 10,000 Inmates	16.6	**18.1**
Allegations of Staff Sexual Misconduct against Inmates	*4-year Total*	*97*	*139*
	Annual Average per 10,000 Inmates	8.7	**14.5**

Source: OIG analysis of BOP and contractor data

APPENDIX 8

THE BOP'S RESPONSE TO THE DRAFT REPORT

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director *Washington, D.C. 20534*

July 25, 2016

MEMORANDUM FOR NINA S. PELLETIER
ASSISTANT INSPECTOR GENERAL
OFFICE OF INSPECTOR GENERAL
EVALUATION AND INSPECTIONS DIVISION

FROM: Thomas R. Kane, Acting Director

SUBJECT: Response to the Office of Inspector General's (OIG) DRAFT Report: OIG Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, Assignment Number A-2014-003

The Bureau of Prisons (BOP) appreciates the opportunity to respond to the open recommendations from the draft report entitled OIG Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons. However, we continue to caution against drawing comparisons of contract prisons to BOP operated facilities as the different nature of the inmate populations and programs offered in each facility limit such comparisons. Despite this caution, the BOP agrees with the recommendations as noted below.

Recommendations

Recommendation 1. Convene a working group of BOP subject matter experts to evaluate why contract prisons had more safety and security incidents per capita than BOP institutions in a number of key indicators, and identify appropriate action, if necessary.

Response: The BOP agrees with this recommendation. A core group of subject matter experts will be selected to evaluate the rate of safety and security incidents per capita within the private contract facilities compared to other BOP institutions, and to determine appropriate action, if necessary.

Recommendation 2. Verify on a more frequent basis that inmates receive basic medical services such as initial medical exams and immunizations.

Response: The BOP agrees with this recommendation. Guidance will be drafted regarding procedures to ensure Health Systems Specialists verify medical services are provided to inmates on a more frequent basis than bi-annually.

Recommendation 3. Ensure correctional services observation steps address vital functions related to the contract, including periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan.

Response: The BOP agrees with this recommendation. Guidance will be drafted regarding procedures to ensure periodic validation of actual correctional officer staffing levels based on the approved staffing plan, to determine whether the contractor is meeting the required staffing levels.

Recommendation 4. Reevaluate the checklist and review it on a regular basis with input from subject matter experts to ensure that observation steps reflect the most important activities for contract compliance and that monitoring and documentation requirements and expectations are clear, including for observation steps requiring monitors to engage in trend analysis.

Response: The BOP agrees with this recommendation. A work group, to include subject matter experts, will convene annually to ensure appropriate trend analysis and updates to the checklist.

If you have any questions regarding this response, please contact Steve Mora, Assistant Director, Program Review Division, at (202) 353-2302.

APPENDIX 9

THE CONTRACTORS' RESPONSES TO THE DRAFT REPORT

CCA
America's Leader in Partnership Correcti
Natasha K. Metcalf
Vice President, Partnership Development

August 8, 2016

[redacted]
Deputy Assistant Inspector General
U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division
Washington, D.C.

Dear [redacted]:

CCA appreciates the opportunity to review and comment on the Office of the Inspector General, U.S. Department of Justice (OIG's) draft report resulting from a review of the Federal Bureau of Prisons (BOP) monitoring of contract prisons. We share the interests of the OIG and the BOP in ensuring contract prisons are operated safely and securely and in compliance with contract requirements. We are also committed to working in partnership with the BOP to address any recommendations in furtherance of these goals.

The comments we would like to provide are regarding the section of the report titled "Contract Prisons Had More Safety and Security-related Incidents per Capita than BOP Institutions for Most of the Indicators We Analyzed." We appreciate the OIG's candor that "we were unable to evaluate all of the factors that contributed to the underlying data, including the effect of inmate demographics and facility locations." We also recognize that the OIG therefore qualified its findings regarding safety and security related incidents; for example, the analysis of contraband seized is caveated with the acknowledgement that the OIG did not examine or compare the interdiction efforts of contract and BOP-operated prisons. We therefore support the OIG's recommendation that the BOP examine the data more thoroughly. CCA is committed to continual improvement in its facility operations, especially as it relates to inmate and staff safety and security, and will cooperate with any examination conducted by the BOP of the factors leading to the incidents in contract prisons.

We believe that demographic variables, particularly as they relate to housing a homogenous foreign national population, will have a significant impact on rates of inmate misconduct. Our experience has been that the criminal alien population housed in contract prisons has a higher rate of Security Threat Group (STG) members and associates (including border, Mexican and Central American gangs) and groups of inmates that strongly define their identity by geographical areas, such as the Mexican state they are from, than U.S. citizen populations of the comparable security level housed in most BOP facilities.

10 Burton Hills Boulevard, Nashville, Tennessee 37215, Phone: 615-263-3000, Fax: 615-263-3090, www.cca.com

There is also robust research literature, including research conducted on BOP populations,[1] indicating that STG-affiliated inmates are significantly more likely to be involved in violence and misconduct, even after controlling for individual characteristics of inmates that prior research has established are associated with violent predispositions. Additionally, these STG-affiliated inmates and geographic groups often have significant rivalries based on conflicts that originate outside of the prison system, leading to inter-group conflict and violence. Furthermore, there is much less intelligence and background information available to assist correctional managers in managing foreign national inmates than most systems would have on a U.S. citizen.

We look forward to further discussions with the BOP regarding the data and recommendations in the report and collaboration on any policy or operational changes.

Sincerely,

Natasha K. Metcalf

[1] Gaes, G.; Wallace, S.; Gilman, E., Klein-Saffran, J. & Suppa, S. (2002). The influence of prison gang affiliation on violence and other prison misconduct. *The Prison Journal, 82 (3)*, 359-385.

August 9, 2016

The GEO Group, Inc.

Corporate Headquarters
One Park Place, Suite 700
621 Northwest 53rd Street
Boca Raton, Florida 33487

TEL: 561 999 5833
FAX: 561 999 7738
www.geogroup.com

[redacted]
Deputy Assistant Inspector General
U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division
1425 New York Avenue, NW, Suite 6100
Washington, D.C. 20530

Re: The GEO Group's Comments to the
Formal Draft of Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons
Dated July 2016

Dear [redacted]:

The GEO Group, Inc. (GEO) appreciates the opportunity to comment on the formal draft of the above referenced report. We have reviewed the draft and have the following for your consideration.

One of the 3 recommendations is that a working group of subject matter experts convene to evaluate why contract prisons had more safety and security incidents per capita than BOP institutions and identify actions. A key ingredient of that review would likely be to evaluate the settings, populations, and reporting systems of the 14 contract and 14 BOP facilities. Any evaluation will require comparisons of the salient elements of all 28 facilities. Whereas the 14 contract prisons are discussed in detail in the report, the 14 BOP facilities are only listed once in the Methodology section. There are some references that, if enhanced, would add to the understanding of the reader and to the further fulfillment of the first recommended action item:

1. Discussion of the difference in population demographics.
   There are notable differences in the population housed at the contract facilities (criminal aliens) and the BOP facilities (U.S. citizens). That difference is briefly noted in two footnotes in the report and one in Appendix 1, but the impact of the difference is not discussed anywhere in the report. The 3 footnotes acknowledge that the Criminal Alien Requirement (CAR) applies to

all contract facilities, except parts of 2 current facilities (noted on page 1, footnote 6). The report states that the selected BOP facilities have "similar population and security levels." (page 15, first paragraph). Appendix 1 explains it a little differently by saying on page 53 under Data Analysis that the comparable BOP housed male inmates with the "same security level (low), similar population *sizes*, and similar geographical locations…" (emphasis added) For the following reasons, GEO believes that the differences in the population demographics are critical to the understanding of the collected data:

a. CAR facility populations are criminal aliens and not U.S. citizens. As a group, the CAR population is very homogeneous, with 72.1 % being from Mexico and the majority of the rest being from a few Central American countries. (Only 11.8 % of the BOP population is non-US. citizens.) As such, the contract facility population responds as one to any issue, real or perceived. The group leaders can control or direct a large majority of the population in a much larger fashion than in facilities with a mixed U.S. citizenry. Traditional populations do not follow recognized inmate leaders in a "one for all and all for one" mentality. This is a factor in analyzing the 8 categories as certain prohibited acts are higher in CAR facilities for this reason and the need for facility lockdowns is higher.
b. An additional effect of this CAR population on the data analysis is that the contraband numbers, particularly the cell phones, are greatly affected by housing the CAR population. The Texas GEO facilities (Reeves and Big Spring) are significantly affected due to the proximity to Mexico and the large numbers of Mexican National inmates in the facilities. This issue is not significant in the BOP facilities.
c. The CAR population comes with a high number of gang affiliations. That factor alone may result in increases in the level of violent incidents in the CAR facilities. See attached report "The Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct" *The Prison Journal, 82 (3), 359-385. See attached.* This 2001 report, researched and authored by 3 BOP subject matter experts, specifically discusses the citizenship factor, distinguishing the citizens of Columbia and Mexico, in part because of the high drug trafficking aspects of those populations. Gang affiliated inmates were more likely to be involved in drug, property, accountability… (page 16) Membership in some of the gangs such as the Texas Syndicate and the Mexakanemi was associated with increases in almost all forms of misconduct.

For the above reasons, GEO would request that the report include additional information on the differences in the population demographics and its effect on the data analysis.

2. Differences in Oversight and Reporting.
An additional factor that might be enhanced in the report would be a comparison of the amount and depth of existing oversight of the contract facilities with the oversight of the BOP facilities. Whereas the contract facilities operate using the BOP policies and systems to a large degree (SENTRY being one), the obligation of full and constant reporting and transparency is part of the good business relationship between GEO and the BOP. That relationship exists at the facility, regional and Washington, D.C. levels. The expectation is that GEO will report all incidents in a timely fashion and the contract facilities are evaluated on that thorough and prompt reporting in the CPARs and in the Contract Facility Monitoring. The ACA accreditation process at the contract facilities is more extensive than the same for the BOP facilities and possibly results again in additional reporting of incidents of all kinds. It seems that this difference in reporting was realized in the inconsistent numbers on the contract facility sexual misconduct as reported by the facilities and as reported in monthly intelligence reports.

In addition it should be noted that each contract facility has 2-4 on-site monitors who are not replicated at the BOP facilities. This is additional monitoring manpower dedicated to daily review of operations, daily reporting of incidents and daily tracking of compliance. There is no dedicated monitoring staff at the BOP facilities.

The current extensive review and oversight may have contributed to the higher contract facility numbers in several of the 8 categories.

GEO sincerely thanks the Office of Inspector General for this correspondence and would welcome the opportunity to add to this discussion at any time if there are questions about the above comments.

Sincerely,

Patricia McNair Persante
Executive Vice President, Contract Compliance

cc: George C. Zoley, Chairman and CEO
J. David Donahue, SVP, U.S. Corrections
Pablo Paez, VP, Corporate Relations
[redacted] Dep. Asst. Inspector General, Dept. of Justice
[redacted] Dept. of Justice

Attachment

MTC Management & Training Corporation

A Leader in Social Impact

Scott Marquardt
President

August 9, 2016

[redacted]
DEPUTY ASSISTANT INSPECTOR GENERAL
US DEPARTMENT OF JUSTICE

Dear [redacted]

Thank you for the opportunity to comment on the Formal Draft Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, July 2016. MTC strongly disagrees with the conclusions and inferences of this report. Any casual reader would come to the conclusion that contract prisons are not as safe as BOP prisons. The conclusion is wrong and is not supported by the work done by the OIG.

The comparison of two sets of prisons is comparing apples and oranges. The contract prisons are holding criminal aliens. The OIG reports that 90% of the inmates in the contract facilities are Mexicans. If the OIG looked into the composition of the BOP prisons, it would find a much more balanced demographic mix. The normal practice is to disperse groups as much as practical to weaken any STG groups operating in a facility. Any difference in incident rates would be far more attributable to this factor than whether the prison is a contract prison or BOP facility. (This point is made on page 22 but the limitation is lost in the body of the report. If the OIG conducted some interviews of BOP and contract officials, this fact could be easily substantiated.)

MTC has wardens that have worked in contract prisons after careers in the BOP. They report that contractors bend over backwards to fully disclose any incident. BOP wardens have more discretion in reporting. The OIG should go back and interview these wardens for themselves to test our assertion.

Each of the assertion in the report should be given to the BOP for further investigation. The inflammatory conclusions that contract prisons are less safe is not supported by the facts and should be re-written.

Specific concerns we have are:

Page i, paragraph 1; page 2, paragraph 1: Disturbances are mentioned from recent years in contract facilities. No mention is made of disturbances in BOP facilities. The list of incidents on Page 2 in contract facilities is very unfair without a similar list of major incidents at the 14 BOP facilities. Any reader is going to come to an unjust conclusion without a balanced report.

Page 12 and 13. The contract facilities clearly operate at a lower cost. The OIG's information supports this. Why does the OIG resist saying it? It's interesting to note the resistance of the OIG to report that

contract prisons operate at a lower cost, but relies on much less reliable support for the assertion that contract prisons are less safe.

Page 15, heading. The heading makes an assertion that relies on a comparison of apples and oranges. The phrasing of the headings and initial sentences should reflect the problem in making the comparison using facilities with very different populations.

Page 15, last paragraph. The BOP facilities should not be referred to as comparable institutions in the document. They house very different populations.

Page 16 and 24 to 26. The inference that grievances represent a prison with higher safety concerns is wrong. Grievances are an integral part of conflict resolution in a positive way. Lack of grievances can indicate an inmate's lack of trust of the prison's problem resolution process. The fact that inmates are widely using the system can show it's working and resolving concerns before they become incidents. The conclusion of the report is misguided.

Page 16, last paragraph. Confiscations of more cell phones, or more contraband, doesn't necessarily mean that there is more contraband coming into the facility. It can also mean that the prison has a more effective system of detecting and removing contraband. The conclusion again is misguided. At most, this data could be an indication that further study is warranted by the BOP. Our point is made at the bottom of Page 19 but only after the questionable assertion is fully developed. The limitation should be in the first sentence of this section.

Page 26, phone calls. The report says the requirement is different for BOP and contract facilities and further reports that all private contractors are meeting the "recommendation" of 5% monitoring. But the report presents this in a negative light on contract prisons.

Thank you again for the opportunity to provide a response to this report and we look forward to ongoing evaluation of performance.

Again, we appreciate the opportunity share our perspective.

Sincerely,

Scott Marquardt

Scott Marquardt

Cc: [redacted]

APPENDIX 10

OIG ANALYSIS OF THE BOP'S RESPONSE

The OIG provided a draft of this report to the BOP and the three contractors. The BOP's response is included in Appendix 8 above. The contractors' responses are included in Appendix 9. Below, we discuss the OIG's analysis of the BOP's response and actions necessary to close the recommendations.

Recommendation 1: Convene a working group of BOP subject matter experts to evaluate why contract prisons had more safety and security incidents per capita than BOP institutions in a number of key indicators, and identify appropriate action, if necessary.

Status: Resolved.

BOP Response: The BOP concurred with the recommendation and stated that a core group of subject matter experts will be selected to evaluate the rate of safety and security incidents per capita within the private contract facilities compared to other BOP institutions, and to determine appropriate action, if necessary.

OIG Analysis: The BOP's actions are responsive to the recommendation. By October 31, 2016, please provide a list of the selected subject matter experts; a schedule of planned work group meetings; copies of meeting agenda for each work group meeting held by October 31, 2016; copies of BOP data or other information the subject matter experts considered to evaluate the rate of safety and security incidents per capita within the private contract facilities compared to other BOP institutions; and documentation of any appropriate action recommended, if necessary.

Recommendation 2: Verify on a more frequent basis that inmates receive basic medical services such as initial medical exams and immunizations.

Status: Resolved.

BOP Response: The BOP concurred with the recommendation and stated that it will draft guidance on procedures to ensure Health Systems Specialists verify that medical services are provided to inmates on a more frequent basis than biannually.

OIG Analysis: The BOP's actions are responsive to the recommendation. By October 31, 2016, please provide copies of guidance on procedures to ensure Health Systems Specialists verify that medical services are provided to inmates on a more frequent basis.

Recommendation 3: Ensure that correctional services observation steps address vital functions related to the contract, including periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan.

Status: Resolved.

BOP Response: The BOP concurred with the recommendation and stated that it will draft guidance on procedures to ensure periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan to determine whether the contractor is meeting the required staffing levels.

OIG Analysis: The BOP's actions are responsive to the recommendation. By October 31, 2016, please provide copies of guidance on procedures to ensure periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan to determine whether the contractor is meeting the required staffing levels.

Recommendation 4: Reevaluate the checklist and review it on a regular basis with input from subject matter experts to ensure that observation steps reflect the most important activities for contract compliance and that monitoring and documentation requirements and expectations are clear, including for observation steps requiring monitors to engage in trend analysis.

Status: Resolved.

BOP Response: The BOP concurred with the recommendation and stated that a work group, to include subject matter experts, will convene annually to ensure appropriate trend analysis and updates to the checklist.

OIG Analysis: The BOP's actions are responsive to the recommendation. By October 31, 2016, please provide a list of the selected subject matter experts; a schedule of planned work group meetings; copies of meeting agenda for each work group meeting held by October 31, 2016; copies of BOP data or other information the subject matter experts considered to ensure appropriate trend analysis; and documentation of any recommended updates to the checklist, if necessary.

The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at www.justice.gov/oig/hotline or (800) 869-4499.

Office of the Inspector General
U.S. Department of Justice
www.justice.gov/oig

OFFICE OF INSPECTOR GENERAL

ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards

Homeland Security

January 29, 2019
OIG-19-18

DHS OIG HIGHLIGHTS

ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards

January 29, 2019

Why We Did This Inspection

U.S. Immigration and Customs Enforcement (ICE) contracts with 106 detention facilities to detain removable aliens. In this review we sought to determine whether ICE contracting tools hold immigration detention facilities to applicable detention standards, and whether ICE imposes consequences when contracted immigration detention facilities do not maintain standards.

What We Recommend

We made five recommendations to improve contract oversight and compliance of ICE detention facility contractors.

For Further Information:
Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

Although ICE employs a multilayered system to manage and oversee detention contracts, ICE does not adequately hold detention facility contractors accountable for not meeting performance standards. ICE fails to consistently include its quality assurance surveillance plan (QASP) in facility contracts. The QASP provides tools for ensuring facilities meet performance standards. Only 28 out of 106 contracts we reviewed contained the QASP.

Because the QASP contains the only documented instructions for preparing a Contract Discrepancy Report and recommending financial penalties, there is confusion about whether ICE can issue Contract Discrepancy Reports and impose financial consequences absent a QASP. Between October 1, 2015, and June 30, 2018, ICE imposed financial penalties on only two occasions, despite documenting thousands of instances of the facilities' failures to comply with detention standards.

Instead of holding facilities accountable through financial penalties, ICE issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards. However, ICE has no formal policies and procedures to govern the waiver process, has allowed officials without clear authority to grant waivers, and does not ensure key stakeholders have access to approved waivers. Further, the organizational placement and overextension of contracting officer's representatives impede monitoring of facility contracts. Finally, ICE does not adequately share information about ICE detention contracts with key officials.

ICE Response

ICE officials concurred with all five recommendations and proposed steps to update processes and guidance regarding contracting tools used to hold detention facility contractors accountable for failing to meet performance standards.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

January 29, 2019

MEMORANDUM FOR: Ronald D. Vitiello
Deputy Director and Senior Official Performing the Duties of Director
U.S. Immigration and Customs Enforcement

FROM: John V. Kelly
Senior Official Performing the Duties of the Inspector General

SUBJECT: *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*

Attached for your information is our final report, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*. We incorporated the formal comments from the ICE Office of the Chief Financial Officer in the final report.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Jennifer Costello, Deputy Inspector General, or Tatyana Martell, Chief Inspector, at (202) 981-6000.

Attachment

Table of Contents

Appendixes

Abbreviations

ADP	average daily population
CDF	contract detention facility
CFR	Code of Federal Regulations
COR	contracting officer's representative
DIGSA	dedicated inter-governmental service agreement
DSM	Detention Service Manager
ERO	Enforcement and Removal Operations
FAR	Federal Acquisition Regulation
ICE	U.S. Immigration and Customs Enforcement
IGA	inter-governmental agreement

IGSA	inter-governmental service agreement
NDS	National Detention Standards
ODO	Office of Detention Oversight
OIG	Office of Inspector General
PBNDS	Performance-Based National Detention Standards
QASP	quality assurance surveillance plan

Background

U.S. Immigration and Customs Enforcement's (ICE) Office of Enforcement and Removal Operations (ERO) confines detainees in civil custody for the administrative purpose of holding, processing, and preparing them for removal from the United States. While ICE owns five detention facilities, it has executed contracts, inter-governmental service agreements (IGSA), or inter-governmental agreements (IGA) with another 206 facilities for the purpose of housing ICE detainees.[1] Table 1 lists the types and numbers of facilities ICE uses to hold detainees as well as the average daily population (ADP) at the end of fiscal year 2017.

Table 1: Types of Facilities ICE Uses for Detention

Facility Type	Description	Number of Facilities	FY 17 End ADP
Service Processing Center	Facilities owned by ICE and generally operated by contract detention staff	**5**	**3,263**
Contract Detention Facility (CDF)	Facilities owned and operated by private companies and contracted directly by ICE	**8**	**6,818**
Inter-governmental Service Agreement (IGSA)	Facilities, such as local and county jails, housing ICE detainees (as well as other inmates) under an IGSA with ICE	**87**	**8,778**
Dedicated Inter-governmental Service Agreement (DIGSA)	Facilities dedicated to housing only ICE detainees under an IGSA with ICE	**11**	**9,820**
U.S. Marshals Service Inter-governmental Agreement (IGA)	Facilities contracted by U.S. Marshals Service that ICE also agrees to use as a contract rider	**100**	**6,756**
	Total:	**211**	**35,435**

Source: ICE data

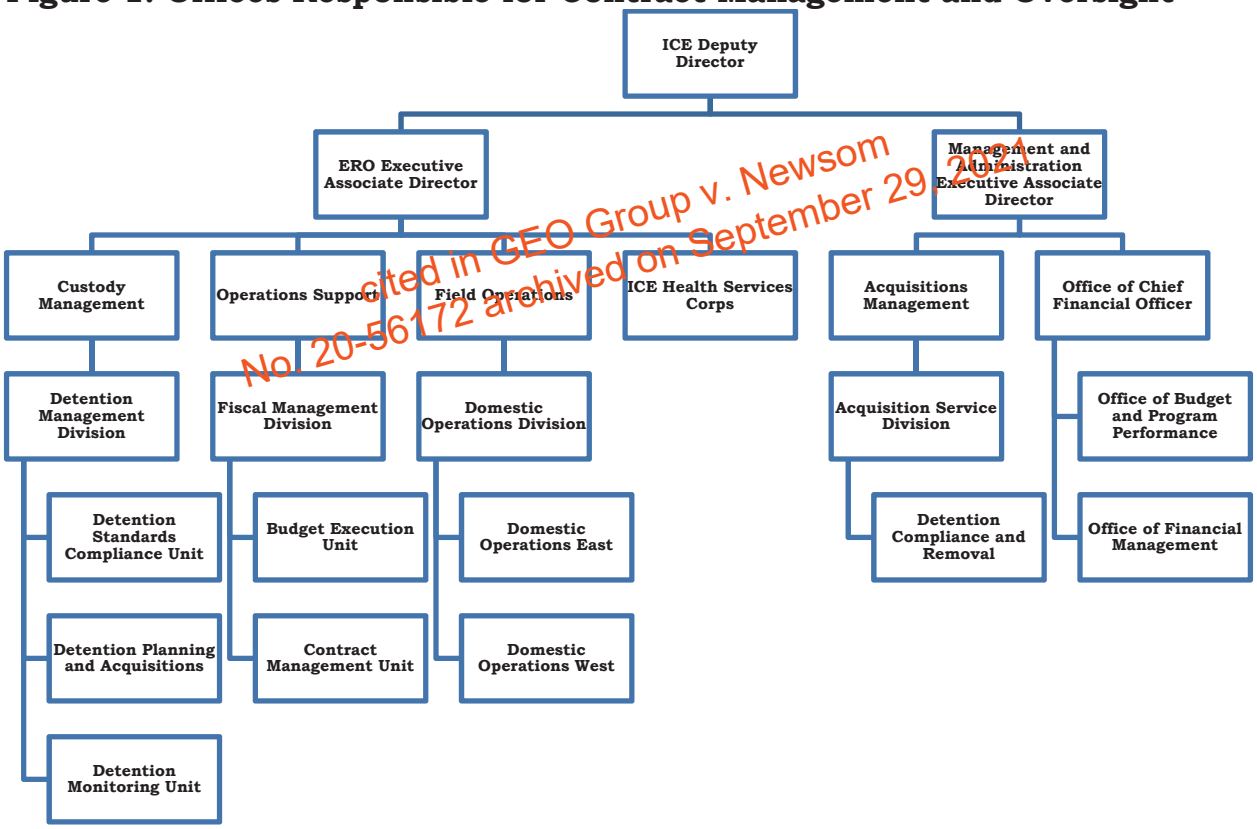
[1] Unless otherwise indicated, in this report we use the term "contract" in reference to the contract, IGSA, or IGA instrument used to establish a relationship between ICE and the detention facility and the term "contract facility" to describe any detention facility operated under a contract, IGSA, or IGA.

For this review, we focused on the 106 CDF, IGSA, and DIGSA facilities[2] for which ICE has primary contracting authority.[3] In FY 2017, these 106 facilities held an average daily population of more than 25,000 detainees. Since the beginning of FY 2016, ICE has paid more than $3 billion to the contractors operating these 106 facilities.

Key ICE Offices Involved in Contract Management and Facility Oversight

ICE spreads duties for planning, awarding, and administering contracts for detention management and overseeing contract facilities between Management and Administration and ERO, resulting in a multilayered system. Figure 1 provides the organizational structure for the key offices involved in managing contracts and overseeing contract facilities.

Figure 1: Offices Responsible for Contract Management and Oversight



Source: Office of Inspector General (OIG) analysis of ICE data

[2] See Appendix C: Facility Listing and Quality Assurance Surveillance Plan Status for a listing of the 106 facilities reviewed.
[3] We did not review contracts from the 100 detention facilities for which the U.S. Marshals Service has primary contracting authority. ICE executed IGAs (contract riders) with the U.S. Marshals Service to house ICE detainees at these facilities.

Within ERO, the Custody Management Division (Custody Management) manages ICE detention operations and oversees the administrative detainees held in detention facilities. Custody Management has a Detention Standards Compliance Unit, which monitors oversight inspections to evaluate compliance with ICE's national detention standards. As part of ICE ERO's development of a Detention Monitoring Program in 2010, Custody Management assigned Detention Service Managers (DSM) to cover 54 contract facilities to monitor compliance with detention standards. Custody Management also analyzes operational bed space needs and initiates requests for additional contract facilities to the Office of Acquisitions Management (Acquisitions Management), within Management and Administration.

Acquisitions Management is responsible for preparing, executing, and maintaining the contracts for detention facilities and for processing any modifications to contracts. Acquisitions Management contracting officers have signature authority to execute and modify contracts for detention facilities. Contracting officers also appoint contracting officers' representatives (COR) to oversee the day-to-day management of each contract facility, but retain ultimate authority for enforcing the terms of the contract.

ICE has 26 principal COR positions physically located at the 24 ERO Field Offices to function as liaisons between field operations and contracting. CORs report to Field Office management and are responsible for ensuring the contractor complies with the terms of the contract. CORs generally conduct detention facility site visits and should have first-hand knowledge of detention facility operations in order to approve invoices for payment and to address instances of noncompliance, such as by pursuing contractual remedies. The Field Operations Division provides guidance to and coordination among the 24 national ERO Field Offices. The Field Office Directors are chiefly responsible for the detention facilities in their assigned geographic area.

Detention Contracts and Standards Compliance

Each detention facility with an ICE contract must comply with one of three sets of national detention standards: *National Detention Standards*, *2008 Performance-Based National Detention Standards* (PBNDS), or 2011 PBNDS. These standards (1) describe a facility's immigration detention responsibilities, (2) explain what detainee services a facility must provide, and (3) identify what a facility must do to ensure a safe and secure detention environment for staff and detainees.

ICE monitors facility compliance with the applicable detention standards through triennial Office of Detention Oversight (ODO) inspections,[4] annual contractor-led compliance inspections by Nakamoto Group, Inc., and the assignment of Custody Management DSMs to cover 54 contract facilities. Inspectors and DSMs report deficiencies to the facility, the ERO Field Office responsible for the facility, and ICE headquarters. To correct these deficiencies, ICE's Detention Standards Compliance Unit, which works independent of the contract offices, prepares and sends uniform corrective action plans to the ERO Field Offices and works with them to ensure the deficiencies get resolved. As we previously reported, this process is not as effective as intended.[5]

Another path for correcting deficiencies is through the contracts. Though not required, detention contracts may include a quality assurance surveillance plan (QASP). The QASP is a standard template that outlines detailed requirements for complying with applicable performance standards, including detention standards, and potential actions ICE can take when a contractor fails to meet those standards. When facilities are found to be noncompliant, CORs may submit a Contract Discrepancy Report (Discrepancy Report), which documents the performance issue.

After CORs submit Discrepancy Reports, facilities are responsible for correcting deficiencies or at least preparing a corrective action plan by the identified due date. If the facility is not compliant, a Discrepancy Report may include a recommendation for financial penalties, such as a deduction in or withholding of ICE payment to the contractor.[6] For example, the QASP states that a deduction may be appropriate when an egregious event or deficiency occurs, such as when a particular deficiency is noted multiple times without correction or when the contractor failed to resolve a deficiency about which it was properly and timely notified. A withholding may be appropriate while the contractor corrects a deficiency. The contracting officer must approve any withholdings or deductions.

We initiated this review to determine whether ICE is effectively managing detention facility contracts for its 106 CDF, IGSA, and DIGSA facilities. This report addresses (1) ICE's failure to use quality assurance tools and impose consequences for contract noncompliance; (2) the use of waivers, which may circumvent detention standards specified in contracts; (3) how the CORs' organizational placement hinders their ability to monitor contracts; and

[4] ODO conducts compliance inspections at detention facilities housing detainees for greater than 72 hours with an average daily population greater than 10. ODO is under ICE's Office of Professional Responsibility.
[5] *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67, June 2018
[6] Detention facilities cannot recoup a deduction, but can recoup a withholding when they correct a deficiency.

(4) CORs' and DSMs' lack of direct access to important contract files.

Results of Inspection

Although ICE employs a multilayered system to manage and oversee detention contracts, ICE does not adequately hold detention facility contractors accountable for not meeting performance standards. ICE fails to consistently use contract-based quality assurance tools, such as by omitting the QASP from facility contracts. In fact, only 28 out of 106 contracts we reviewed included the QASP. Because the QASP contains the only documented instructions for preparing a Discrepancy Report and recommending financial penalties, there is confusion about whether ICE can issue Discrepancy Reports and impose financial consequences absent a QASP. Between October 1, 2015, and June 30, 2018, ICE imposed financial penalties on only two occasions, despite documenting thousands of instances of the facilities' failures to comply with detention standards. Instead of holding facilities accountable through financial penalties, ICE issued waivers to facilities with deficient conditions, seeking to exempt them from having to comply with certain detention standards. However, ICE has no formal policies and procedures about the waiver process and has allowed officials without clear authority to grant waivers. ICE also does not ensure key stakeholders have access to approved waivers. Further, we determined that the organizational placement and overextension of CORs impede monitoring of facility contracts. Finally, ICE does not adequately share information about ICE detention contracts with key officials, such as CORs and DSMs, which limits their ability to access information necessary to perform core job functions.

ICE Does Not Consistently Use Contract-Based Quality Assurance Tools and Impose Consequences for Contract Noncompliance

As noted, there are two paths for correcting deficiencies: the facilities inspection process and the quality assurance tools in the facilities contracts themselves. With respect to the inspection process, we previously reported that ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them.[7] During our current work, we found similar problems with ICE's use of contract-based quality assurance tools. Specifically, ICE did not consistently include the QASP in the facility contracts we reviewed, which has led to confusion among CORs about how to issue Discrepancy Reports. These problems are compounded because ICE does not

[7] *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67, June 2018

track these reports and rarely imposes financial consequences, even when identified deficiencies present significant safety and health risks.

Out of 106 contracts we reviewed, only 28 contained the QASP.[8] The QASP is especially important because it contains the only documented instructions for preparing a Discrepancy Report and recommending financial penalties, when informal resolution is not practicable.[9] Consequently, when contracts do not contain the QASP, CORs and contracting officers are left confused as to what actions they can take when deficiencies are identified. For example, of the 11 CORs we interviewed, 5 told us they could issue a Discrepancy Report to a facility that did not have the QASP, while 2 said they could not. Two others said they could issue a Discrepancy Report without the QASP, but they could not seek financial penalties for noncompliance. The two remaining CORs told us they did not know whether they could issue a Discrepancy Report without a QASP.

Even where ICE does issue Discrepancy Reports, ICE does not track their use or effectiveness. No office within ICE could provide any data on how many Discrepancy Reports are issued to facilities and for what reasons. An ICE official from Acquisitions Management explained that his office would have to review the individual contract files to see whether Discrepancy Reports were issued and why. The Discrepancy Reports we reviewed involved serious deficiencies such as significant understaffing, failure to provide sufficient mental health observation, and inadequate monitoring of detainees with serious criminal histories. However, we have no way of verifying whether any of these deficiencies have been corrected.

Furthermore, ICE is not imposing financial penalties, even for serious deficiencies such as those we found in the Discrepancy Reports. In addition to the issues flagged by these Discrepancy Reports, from October 2015 to June 2018 various inspections and DSMs found 14,003 deficiencies at the 106 contract facilities we focused on for this review. These deficiencies include those that jeopardize the safety and rights of detainees, such as failing to notify ICE about sexual assaults and failing to forward allegations regarding misconduct of facility staff to ICE ERO. Despite these identified deficiencies, ICE only imposed financial penalties twice. ICE deducted funds from one facility as a result of a pattern of repeat deficiencies over a 3-year period, primarily related to health care and mental health standards. The other deduction was made due to a U.S. Department of Labor order against the

[8] Specifically, all 8 CDF and 10 of the 11 DIGSA facilities had a QASP in place, but only 10 of 87 non-dedicated IGSA facilities had a QASP.
[9] The QASP directs the COR to send a Discrepancy Report documenting the deficiencies to the facility. The facility is required to respond to the Discrepancy Report by a specified date, indicating that either the deficiencies have been corrected or a corrective action plan is in place.

contractor for underpayment of wages and was not related to any identified deficiency. Our review of the corresponding payment data identified about $3.9 million in deductions, representing only 0.13 percent of the more than $3 billion in total payments to contractors during the same timeframe. ICE did not impose any withholdings during this timeframe.

ICE's Waiver Process May Allow Contract Facilities to Circumvent Detention Standards and May Inhibit Proper Contract Oversight

Instead of holding facilities accountable through financial penalties, ICE frequently issued waivers to facilities with deficient conditions, seeking to exempt them from having to comply with certain detention standards.[10] However, we found that ICE has no formal policies and procedures to govern the waiver process and has allowed ERO officials without clear authority to grant waivers. We also determined that ICE does not ensure key stakeholders have access to approved waivers. In some cases, officials may violate Federal Acquisition Regulation requirements because they seek to effectuate unauthorized changes to contract terms.

Lack of Guidance on the Waiver Process Potentially Exempts Contract Facilities from Complying with Certain Detention Standards Indefinitely

Generally, waiver requests result from ICE's inspections or DSMs' monitoring. After completing an inspection, inspectors brief the facility on the deficiencies they find and issue inspection reports. The Detention Standards Compliance Unit then issues uniform corrective action plans to the ERO Field Offices and DSMs. The Field Offices forward the uniform corrective action plans to the facilities, work with the facilities to correct the identified deficiencies, and report those corrective actions to the Detention Standards Compliance Unit. DSMs monitor compliance on a daily basis and report deficiencies to the facilities, to local ICE Field Offices, and through weekly reports to Custody Management.

As ICE ERO works with the contractor to resolve the deficiencies, a facility can assert that it could not remedy the deficiency because complying with the standard can create a hardship, because of a conflict with a state law or a local policy, a facility design limitation, or another reason. In these cases, the Field Office Director may submit a waiver request to Custody Management, which approves or denies the request. We analyzed the 68 waiver requests submitted

[10] *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67, June 2018

between September 2016 and July 2018. Custody Management approved 96 percent of these requests, including waivers of safety and security standards.[11]

Despite this high approval rate, ICE could not provide us with any guidance on the waiver process. Key officials admitted there are no policies, procedures, guidance documents, or instructions to explain how to review waiver requests. The only pertinent documents that ICE provided were examples of memoranda that Field Office Directors could use to request waivers of the detention standards' provisions on strip searches. However, the memoranda did not acknowledge the important constitutional and policy interests implicated by a facility's use of strip searches. ICE officials did not explain how Custody Management should handle such waiver requests when a contrary contractual provision requires compliance with a strip search standard.

Further, contract facilities may be exempt from compliance with otherwise applicable detention standards indefinitely, as waivers generally do not have an end date and Custody Management does not reassess or review waivers after it approves them. In our sample of 65 approved waiver requests, only three had identified expiration dates; the 62 others had no end date.

The Chief of the Detention Standards Compliance Unit within ICE ERO Custody Management has drafted written guidance on the waiver submission and approval process, but has not finalized that document. Without formal waiver guidance and review processes, ICE may be indefinitely allowing contract facilities to circumvent detention standards intended to assure the safety, security, and rights of detainees. A facility's indefinite exemption from certain detention standards raises risks to detainee health and safety that ICE could reduce by enforcing compliance with those standards. For example, Custody Management granted a waiver authorizing a facility (a CDF) to use 2-chlorobenzalmalononitrile (CS gas) instead of the OC (pepper) spray authorized by the detention standard. According to information contained in the waiver request, CS gas is 10 times more toxic than OC spray.[12] Another waiver allows a facility (a DIGSA) to commingle high-custody detainees, who have histories of serious criminal offenses, with low-custody detainees, who have minor, non-violent criminal histories or only immigration violations, which is a practice the standards prohibit in order to protect detainees who may be at risk of victimization or assault.[13]

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[11] PBNDS 2008 and PBNDS 2011 organize standards by seven topics: safety, security, order, care, activities, justice, and administration and management. NDS 2000 organizes standards by three topics: detainee services, health services, and safety and control.

[12] ICE PBNDS 2011, Part 2 – Security, 2.15 Use of Force and Restraints Section (V)(G)(4) states, "The following devices are not authorized [...] mace, CN, tear gas, or other chemical agents, except OC spray."

[13] ICE PBNDS 2011, Part 2 – Security, 2.2 Custody Classification System requires facilities to avoid commingling low-custody detainees, who have minor, non-violent criminal histories or

ERO Officials without Clear Authority Are Granting Waivers That May Undermine Contract Terms

ICE's practice for issuing waivers could violate the Federal Acquisition Regulation (FAR), which establishes policies and procedures that executive agencies, including DHS, must use for acquisitions, unless other legal authority removes an acquisition from the FAR's coverage. Under the FAR, "only contracting officers acting within the scope of their authority are empowered to execute contract modifications."[14] To prevent others from exercising authority expressly reserved for contracting officers, the FAR explains that other Federal personnel shall not "[a]ct in such a manner as to cause the contractor to believe that they have authority to bind the Government."[15] ICE asserts that only its CDFs, not its DIGSAs or IGSAs, are acquisitions governed by the FAR. However, Acquisitions Management procurement guidance stipulates that, in handling DIGSA and IGSA issues, contracting officers "should utilize applicable FAR principles and clauses that are in the Government's best interest to the maximum extent possible."[16]

Despite these FAR provisions and this guidance, a senior official told us that the Assistant Director for Custody Management has the authority to act on waiver requests. The Assistant Director has, in turn, orally delegated authority to decide waiver requests to the Deputy Assistant Director for Custody Management. However, Custody Management did not provide any documentation of this authority, delegated or otherwise, to grant waivers. According to the same official, the detention standards are ICE policies and the current waiver approval process is sufficient. This position does not acknowledge that ICE contractually requires facilities to comply with detention standards, and that only the contracting officer — not the Assistant Director or the Deputy Assistant Director — can modify those contract terms.

Through their approval of waivers, ERO officials without the authority to modify contracts have sought to remove certain detention standards from oversight, even though those standards are part of the contract for the detention facility. In reviewing waivers approved for CDFs, we found that ICE issued two waivers between October 2016 and July 2018 for aspects of ICE's 2011 PBNDS that are part of ICE's contracts for these facilities. Through these waivers, ICE allowed facilities to deviate from PBNDS 2011 requirements.

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only immigration violations, with high-custody detainees, who have histories of serious criminal offenses.

[14] 48 Code of Federal Regulations (CFR) § 43.102(a)

[15] *Id.* § 43.102(a)(2)

[16] ICE Acquisitions Management, Procurement Guide 18-02, *Inter-governmental Service Agreements (IGSA)* (Apr. 20, 2018)

ICE Staff Responsible for Management and Oversight of Facility Contracts Do Not Receive Information on Approved Waivers

Custody Management does not share information on approved waivers with Acquisitions Management, which is responsible for administering detention contracts. Acquisitions Management contracting officers told us that most of them did not know that Custody Management had issued waivers after a facility entered into a detention contract with ICE. The Detention Standards Compliance Unit's draft guidance for the waiver process does not require Custody Management to share waiver requests or approvals with Acquisitions Management. Because Acquisitions Management does not receive information on approved waivers, it cannot determine whether the waiver contradicts contract terms or violates the FAR or other procurement requirements. Further, Acquisitions Management cannot ensure that contracting officers and CORs know about Custody Management's waiver decision, which undermines their ability to monitor their assigned contracts.

Organizational Placement and Overextension of CORs Impede Monitoring of Detention Facilities

COR placement under the Field Office raises concerns about the CORs' ability to perform their primary functions of monitoring detention facilities and enforcing contract terms. They may not be able to fulfill these functions because the Field Office pressures them to do things outside of protocol and assigns them additional duties. In some cases, CORs have unachievable workloads that inhibit their ability to provide consistent and appropriate oversight. Overall, these issues may allow facility violations of contract terms and noncompliance with performance standards to go unaddressed and may lead to dangerous detention conditions.

Reporting to Field Offices May Compromise a COR's Independent Oversight Efforts

When the COR program was initially developed in 2009, CORs were located at Field Offices, but the COR Program Manager at headquarters served as their first-line supervisor. Field Office Directors provided input for CORs' performance work plans and ratings, but did not directly supervise them. This supervisory chain allowed the COR to remain independent from the Field Office and detention facility operations. However, after a year under this supervisory structure, the COR supervisory chain was changed by making the assigned Field Office responsible for COR supervision.

An email to Field Office Directors and Deputy Field Office Directors announcing the transition gave four reasons for the initial alignment of CORs reporting to

headquarters.[17] In contrast, the only justification ICE provided for the realignment was that the current organizational reporting relationship was "proving to be cumbersome and sub-optimal." During interviews, ICE officials could not provide any additional explanation for why ICE moved supervision of CORs from headquarters to the Field Offices. Most CORs we interviewed who held those positions during the transition explained that this organizational realignment was detrimental to their duties and independence. For example, two CORs said they were hesitant to identify instances of noncompliance or issue Discrepancy Reports on contracts they oversee because they feared retaliation from Field Office management.

The contracting officers we spoke with had similar concerns regarding the CORs' ability to do their jobs independently. Some contracting officers noted that CORs might be reluctant to disagree with their Field Office supervisors, who complete their performance appraisals. For example, one contracting officer identified a time when, at the request of the Field Office supervisor, a COR was authorizing payment for transport of ICE detainees on a contract that did not allow transportation. However, this COR lacked the authority to approve such contract additions because only the contracting officer can modify contracts.

The current COR position descriptions permit CORs to complete "other duties as assigned," which allows Field Offices to task CORs with duties outside of contracting oversight and management. During interviews with 11 CORs we heard that Field Office managers have tasked CORs with collateral duties to the detriment of their primary function. These tasks included supervising mission support personnel; acting as the interim DSM; processing background investigations for all employees; and developing requirements for contracts on projects unrelated to detention, like retirement planning and finding office space for employees.

Furthermore, inconsistent support from the Field Office can create an environment that impedes CORs' oversight of detention contracts. According to the *ERO Contracting Officer's Representative Supplement*, dated October 2015, the COR work plan template identifies site visits as a possible monitoring technique for contracts, but not all CORs are encouraged to conduct these visits. Three Field Offices restricted CORs from traveling to detention facilities, which impedes proper evaluation of facilities' compliance with contract terms.

[17] The May 26, 2010 email from ERO's Assistant Directors for Field Operations and Mission Support announcing the transition of CORs (formerly COTRs) from headquarters to Field Offices stated, "While the COTR positions were established in the field, they reported directly to Headquarters (HQ) primarily to (1) provide the COTR with the ability and autonomy to ensure that contracts are properly established and administered; (2) ensure that the COTR's primary duty is contract monitoring and administration; (3) establish and standardize best practices across the DRO enterprise; and (4) enhance dialogue with HQ regarding field office acquisition, contract administration, and facility project management issues."

According to a senior official, ICE is working with the Office of Personnel Management to adjust the current COR position descriptions; expected changes include removing the "other duties as assigned" language and providing clearer guidance on COR responsibilities.

Overextending CORs May Weaken Contract Oversight

Although some CORs are assigned additional work, others are overtasked with detention contracts. CORs tasked with overseeing many facility contracts and invoices, as well as non-detention contracts supporting the functions of a Field Office, told us they were overextended. For example, of the 11 CORs we interviewed:

- Four CORs oversee 10 or more facilities, with 2 overseeing 16 and 22 contracts, respectively, across multiple states.
- One COR has been assigned as the primary Project Manager for a new processing center that will be used by four Federal agencies, while also being a COR for three detention contracts.
- Five CORs also oversee large transportation contracts, which require CORs to spend substantial time reviewing and approving invoices.

In one Field Office covering multiple states, Field Office leadership allowed CORs to develop a network of assistants to aid oversight efforts. Other Field Offices use mission support personnel to support CORs with administrative tasks, such as reconciling invoices.

Lack of Direct Access to Important Contract Files Hinders CORs' and DSMs' Ability to Monitor Detention Contracts

CORs are integral to ICE's efforts to monitor its detention contracts, a process in which DSMs are also heavily involved. However, CORs and DSMs lack consistent access to all pertinent contracts and modifications. Although DHS requires ICE to maintain an official file folder for each contract, which should contain the contract and all modifications to it, this system does little to ensure all key stakeholders have access to pertinent contract documents.

Acquisitions Management places contracts and modifications in an electronic database called PRISM, to which several members of Contract Management have access but neither CORs nor DSMs have access. Acquisitions Management also places contract documents, including modifications, on the "Q Drive," an electronic library that will eventually replace PRISM as the official repository for detention contracts. However, CORs and DSMs do not have

access to the Q Drive either. Acquisitions Management also has some historical paper-only files for active contracts initiated around 2005 or earlier, but does not give CORs automatic access to these documents.

CORs must maintain their own file, which is part of the official contract file, and which should include a copy of the contracts and modifications that CORs oversee. One interviewee noted that CORs should receive contracts and modifications from contracting officers or contract specialists, but this practice is not consistent. Absent access to contracts and modifications through Acquisitions Management, CORs in the field must obtain these documents on their own, which can be time consuming and inefficient. When one COR began her position, she had to create her own electronic drive of documents, where she maintains copies of all contracts and modifications.

Conclusion

From October 2015 to June 2018, ICE paid contractors operating the 106 detention facilities subject to this review more than $3 billion. Despite documentation of thousands of deficiencies and instances of serious harm to detainees that occurred at these detention facilities, ICE rarely imposed financial penalties. ICE should ensure that detention contracts include terms that permit ICE to hold contractors to performance standards and impose penalties when those standards are not maintained. ICE needs to finalize policies and procedures for the waiver process to ensure that officials do not circumvent contract terms. ICE also needs to develop or enhance policies and procedures to ensure that those responsible for contract oversight have access to information necessary to do their jobs and receive adequate guidance about the actions available to them when contract performance standards are not met. Further, ICE should ensure CORs in the field are unencumbered in their ability to manage and oversee detention contracts. Finally, ICE should strengthen the ability of CORs and DSMs to access documents related to pertinent detention contracts.

Recommendations

We recommend the Executive Associate Director for Management and Administration:

Recommendation 1: Develop a process to decide when to seek to include a QASP in existing contracts and IGSAs that are not subject to a QASP and all future detention contracts and IGSAs. For each contract and IGSA that remains without a QASP, document the reason(s) why a QASP could not be included and summarize the actions available to contracting officers and CORs when contractors fail to meet applicable detention standards.

Recommendation 2: Develop protocols to guide CORs and contracting officers in issuing Discrepancy Reports and imposing appropriate financial penalties against detention facility contractors in response to contract noncompliance. The protocols should include:

1. clear guidance for determining when to issue a Discrepancy Report;
2. instructions for issuing and approving a Discrepancy Report;
3. clear guidance for determining when to impose a financial penalty and what type of financial penalty to impose;
4. instructions for imposing a financial penalty; and
5. a process to track all Discrepancy Reports issued and financial penalties imposed by ICE, to include data regarding the final resolution of the issue that led to the Discrepancy Report or financial penalty.

We recommend the Executive Associate Director for Enforcement and Removal Operations:

Recommendation 3: Develop protocols to ensure that all existing and future waivers are:

1. approved by ICE officials with appropriate authority;
2. distributed to key stakeholders, such as contracting officers, CORs, and DSMs, who need the waivers to perform core job functions;
3. consistent with contract terms; and
4. compliant with FAR requirements, as applicable.

Recommendation 4: Develop a staffing plan for detention CORs, to permit adequate contract oversight and ensure an achievable workload. Evaluate the organizational placement of CORs. If CORs remain under Field Office supervision, develop safeguards to prevent Field Office supervisors from interfering with CORs' ability to fulfill their contract oversight duties.

We recommend the Executive Associate Director for Management and Administration:

Recommendation 5: Develop protocols to ensure that CORs and DSMs have full and expedient access to the contract documentation they need to perform core job functions.

Management Comments and OIG Analysis

We have included a copy of ICE's Management Response in its entirety in appendix B. We also received technical comments from ICE and incorporated them in the report where appropriate. We consider all recommendations to be resolved and open. A summary of ICE's responses and our analysis follows.

ICE concurred with all five recommendations but disagreed with some of the report's conclusions. As a result, we will be closely monitoring all actions ICE takes in reponse to the reccomendatiosn to ensure compliance. Specifically, ICE purports that it "already has practices in place to maintain *and distribute* waivers to appropriate stakeholders" (emphasis added). However, ICE did not provide DHS OIG with documentation supporting its claim that it has practices in place to distribute waivers to appropriate stakeholders; rather, the evidence indicates only that ICE makes approved waivers accessible to stakeholders upon request. Providing access to waivers upon request is not the same as distributing approved waivers to appropriate stakeholders. Compounding the issue, we determined that ICE did not provide notification of approved waivers effectively. For instance, we determined that CORs and a DSM were not notified of approved waivers, and contracting officers confirmed that most of them did not know that Custody Management had issued waivers.

ICE also stated that the report does not discuss actions it took to resolve "non-compliance issues" at facilities, including removing detainees from a facility, scaling back its usage of a facility, and terminating agreements. However, ICE failed to provide specific examples of corrective action at particular facilities, thereby limiting DHS OIG's ability to evaluate whether the actions were effective means by which to hold contractors accountable. Moreover, the objectives of this review focused on whether ICE uses *contracting tools* to ensure facilities meet applicable detention standards. ICE's purported removal of detainees from a facility, or diminished use of a facility, are not relevant to review of its use of contracting tools to drive contractor accountability. ICE's assertion that it terminated facility agreements for unspecified "non-compliance issues" at other, unnamed facilities is also irrelevant to our review. Our review focused on ICE's efforts to use contracting tools to ensure compliance with applicable detention standards at 106 CDF, IGSA, and DIGSA facilities (see appendix C). Based on the information provided by ICE during the review, ICE's facility contracts for these facilities were not terminated because of a failure to meet applicable detention standards.

ICE also stated it uses a "layered approach to monitor detention conditions at facilities, with processes in place to implement corrective actions in instances where non-compliance with ICE detention standards is found." We determined that the processes in place do not ensure consistent compliance with detention standards. Not only does ICE not fully use contracting tools to hold detention facility contractors accountable for failing to meet performance standards, our previous work has determined that ICE's inspections and onsite monitoring do not ensure consistent compliance with detention standards or promote comprehensive deficiency corrections.[18] We identified serious incidents of

[18] *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67, June 2018

noncompliance during our own unannounced inspections of ICE detention facilities[19] and the more than 14,000 deficiencies identified by various inspections and DSMs from October 2015 to June 2018 suggest room for improvement in the current processes for addressing noncompliance with ICE detention standards.

ICE Response to Recommendation 1: ICE concurred with the recommendation. ICE will ensure that all CDF, service processing centers, and DIGSA facilities will have a QASP. ICE will develop a process to evaluate whether to include a QASP in the remaining contracts or IGSAs. For each contract and IGSA that remains without a QASP, ICE will document the reason why a QASP was not included. ICE will provide training and issue procurement guidance to summarize the actions available to contracting officers and CORs when contractors fail to meet applicable detention standards. ICE anticipates completing these actions by March 31, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive documentation showing that ICE has: (1) included a QASP for all CDFs, service processing centers, and DIGSA facilities; (2) implemented a process to evaluate whether to include a QASP in all remaining and future detention contracts or IGSAs; (3) documented the reason why a QASP was not included for each contract or IGSA that remains without a QASP; and (4) completed training and issued procurement guidance summarizing the actions available to contracting officers and CORs when contractors fail to meet applicable detention standards.

ICE Response to Recommendation 2: ICE concurred with the recommendation. ICE has already begun providing additional training to all ERO CORs responsible for detention contracts, consisting of six training sessions that cover various aspects of COR duties. The training includes sessions that cover various methods to ensure contract compliance, monitoring and inspections, and dealing with unsatisfactory contractor performance. ICE will also provide more specific training on monitoring and inspections and dealing with unsatisfactory performance to Acquisitions Management contracting officers responsible for detention contracts.

[19] *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, OIG-18-86, September 2018; *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32, December 2017; and *Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California*, OIG-17-43-MA, March 2017

ICE will also develop and issue procurement guidance that will provide protocols for Discrepancy Reports, which will address when to issue a Discrepancy Report, instructions for issuing and approving a report, when to impose a financial penalty, what type of financial penalty to impose, and instructions for imposing a financial penalty. The procurement guidance will also include a process to track all Discrepancy Reports issued and financial penalties imposed. ICE anticipates completing all actions responsive to this recommendation by March 31, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive documentation showing that: (1) all ERO CORs have completed the specified training covering methods to ensure contract compliance, monitoring and inspections, and dealing with unsatisfactory contractor performance; (2) all Acquisitions Management contracting officers have completed the specified training covering monitoring and inspections and dealing with unsatisfactory performance; and (3) ICE has developed and issued procurement guidance providing protocols for Discrepancy Reports, which addresses when to issue a Discrepancy Report, instructions for issuing and approving a report, when to impose a financial penalty, what type of financial penalty to impose, instructions for imposing a financial penalty, and a process to track all Discrepancy Reports issued and financial penalties imposed.

ICE Response to Recommendation 3: ICE concurred with the recommendation. ICE will document the waiver process in a policy or standard operating procedure (SOP) that is accessible to stakeholders, such as contracting officers, CORs, and on-site DSMs. The policy or SOP will clearly address when waivers need to be incorporated via contract modification. ICE will also review all current waivers to determine continuing applicability and, if appropriate, cancel any waivers that are no longer needed. ICE will also ensure that the annual or more frequent review of approved waivers by appropriate personnel is included in its documented waiver process. Finally, ICE will ensure stakeholders have access to approved waivers and expand waiver distribution to DSMs, contracting officers, CORs, and other staff who monitor detention conditions or contract performance, in addition to the ERO Field Office personnel and facility management staff who already receive the waivers. ICE anticipates completing these actions by April 30, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive the waiver policies or SOP addressing when waivers need to be incorporated via contract modification, requiring annual or more frequent review of approved waivers by appropriate personnel, and ensuring access to and distribution of waivers to stakeholders, along with documentation showing that current waivers were reviewed to evaluate whether they were approved by ICE officials with the authority to do so, are consistent with contract terms, comply with FAR requirements, and continue to be applicable.

ICE Response to Recommendation 4: ICE concurred with the recommendation. ICE will review the workload of its detention facility CORs, and determine an ideal staffing level to oversee its existing contracts. ICE will consider the operational placement of CORs under Field Office supervisors. If CORs remain under Field Office supervision, ERO leadership will ensure Field Office managers are fully aware of the importance of the CORs' responsibilities and allowing them sufficient time and resources to complete their contract oversight duties. ICE anticipates completing these actions by September 30, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive documentation showing ICE completed a review of the workload of detention facility CORs and determined an ideal staffing level to oversee its existing contracts, evaluated the operational placement of CORs, and, if CORs remain under Field Office supervision, ensured Field Office managers are made fully aware of the importance of the CORs' responsibilities and allowing them sufficient time and resources to complete their contract oversight duties.

ICE Response to Recommendation 5: ICE concurred with the recommendation. ICE now requires that every contract document be available electronically on a shared drive. ICE will give CORs and DSMs read-only access to this system to allow them efficient access to contract documentation. ICE anticipates completing this action by June 30, 2019.

OIG Analysis: We consider these actions responsive to the recommendation, which is resolved and open. We will close this recommendation when we receive adequate supporting documentation that CORs and DSMs have full and expedient access to the contract documentation they need to perform core job functions.

Appendix A
Objective, Scope, and Methodology

DHS OIG was established by the *Homeland Security Act of 2002* (Public Law 107–296) by amendment to the *Inspector General Act of 1978*. In this review, we sought to determine whether ICE contracting tools hold immigration detention facilities to applicable detention standards; and whether ICE imposes consequences when contracted immigration detention facilities do not maintain standards.

To answer the objective, we evaluated the policies and procedures governing ICE detention contract execution, amendment, and oversight and conducted a walkthrough of contract files with ICE Acquisitions Management to obtain an understanding of the detention contracting process. We reviewed a judgmental sample of current contracts, which included CDF, IGSA, and DIGSA facilities, and obtained and reviewed payment and penalty data for the 106 facilities within the scope of this review. We collected and analyzed data regarding detention facility inspections and calculated the number of deficiencies identified by ICE. We reviewed all of the proposed waivers submitted for detention facilities subject to this review and evaluated the waiver process and ICE's authority to issue waivers. We interviewed contracting officers, CORs, and DSMs, along with ICE representatives from several components, including Acquisitions Management, Office of Contract Management, ERO's Budget Office, Office of the Chief Financial Officer, Detention Management Division, Burlington Finance Center, and Office of Detention Policy and Planning. We also interviewed Field Office leadership from ICE's Baltimore Field Office.

We conducted this review between January and October 2018 pursuant to the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency. The evidence obtained provides a reasonable basis for our findings and conclusions based upon our objectives.

Appendix B
Management Comments to the Draft Report

Office of the Chief Financial Officer

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

DEC 0 3 2018

MEMORANDUM FOR: John V. Kelly
Senior Official Performing the Duties of the Inspector General
Office of the Inspector General

FROM: Stephen A. Roncone
Chief Financial Officer and
Senior Component Accountable Official

SUBJECT: Management Response to OIG Draft Report: "ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards" (Project No. 17-090-ISP-ICE)

Thank you for the opportunity to review and comment on this draft report. U.S. Immigration and Customs Enforcement (ICE) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

ICE is pleased the OIG acknowledges ICE's compliance monitoring efforts, including actions taken to proactively address findings in this report. ICE is committed to protecting the safety, rights, and health of detainees in its care, and appreciates the OIG's recognition of ICE's processes to monitor facilities through inspections, report deficiencies, implement corrective action plans, and ensure resolution. The OIG also described ICE's existing process for issuing waivers, noting that ICE has drafted written guidance on its process. In addition, the draft report summarized steps ICE has already taken to refine the Contracting Officer's Representative (COR) position descriptions.

However, ICE disagrees with some of the OIG's conclusions and believes the report would benefit from additional context. For example, ICE already has practices in place to maintain and distribute waivers to appropriate stakeholders. In addition to the compliance tools mentioned in the draft report, ICE's Office of Acquisition Management and Enforcement and Removal Operations (ERO) took action where necessary to address non-compliance issues. For example, there are multiple facilities where ICE terminated the agreement, removed all detainees from the facility, or scaled back its usage of the facility based on non-compliance issues. This is an effective tool to hold a contractor accountable.

ICE is committed to continually enhancing civil detention operations to promote a safe and secure environment for both detainees and staff. ICE uses a layered approach to monitor

www.ice.gov

detention conditions at facilities, with processes in place to implement corrective actions in instances where non-compliance with ICE detention standards is found. ICE's detention operations are governed by national detention standards and are overseen by Field Office personnel, inspections by ICE's Office of Professional Responsibility, and other programmatic oversight and inspections by ERO.

The draft report contained five recommendations with which ICE concurs. Attached find our detailed response to each recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment

Attachment: Management Response to Recommendations Contained in 17-090-ISP-ICE

OIG recommended the Executive Associate Director for Management and Administration:

Recommendation 1: Develop a process to decide when to seek to include a QASP [quality assurance surveillance plan] in existing contracts and IGSAs that are not subject to a QASP and all future detention contracts and IGSAs [inter-governmental service agreements]. For each contract and IGSA that remains without a QASP, document the reason(s) why a QASP could not be included and summarize the actions available to contracting officers and CORs when contractors fail to meet applicable detention standards.

Response: Concur. ICE acknowledges the usefulness of the QASP. All contract detention facilities, service processing centers, and dedicated inter-governmental service agreement facilities[1] either already have a QASP or will have a QASP added. The Office of Acquisition Management (OAQ) is working with Enforcement and Removal Operations (ERO) to develop a process for evaluating whether to include a QASP in the remaining contracts or IGSAs.[2]

Almost all the agreements referenced in the OIG report that do not already contain a QASP are agreements with state and local governments, a majority of which have average daily populations below 100. OAQ has had varied success including QASPs in smaller facility contracts. Historically, IGSAs and intergovernmental agreements have not had QASPs as part of the contract for a variety of reasons, the most important being the ease of terminating the agreement for any reason. If the provider is not performing or is performing below standards or expectations, ICE can terminate the agreement or reduce the population levels immediately. This is a very effective tool to ensure compliance and hold contractors accountable.

The Discrepancy Report process is an aligning tool as opposed to a sanctioning tool for penalizing our service providers, a majority of which are state and local governments. ICE's goal is to receive compliance and delivery of services, not to recoup money that we have agreed to pay by virtue of the contract with a state or local entity.

OAQ will document information on each facility contract, including whether it has a QASP included. If a QASP is not included, there will be a documented reason to support the decision. Actions available to Contracting Officers (COs) and CORs will be covered in training and procurement guidance, which are addressed in response to recommendation 2. Estimated Completion Date (ECD): March 31, 2019.

Recommendation 2: Develop protocols to guide CORs and contracting officers in issuing Discrepancy Reports and imposing appropriate financial penalties against detention facility contractors in response to contract noncompliance. The protocols should include:

1. clear guidance for determining when to issue a Discrepancy Report;

---

[1] Facilities dedicated to housing only ICE detainees.
[2] Facilities, such as local and county jails, housing ICE detainees and other inmates.

2. instructions for issuing and approving a Discrepancy Report;
3. clear guidance for determining when to impose a financial penalty and what type of financial penalty to impose;
4. instructions for imposing a financial penalty; and
5. a process to track all Discrepancy Reports issued and financial penalties imposed by ICE, to include data regarding the final resolution of the issue that led to the Discrepancy Report or financial penalty.

Response: Concur. ICE has been working to improve guidance for CORs and contracting officers through training and the issuance of official Procurement Guidance (PG).

More specifically, OAQ is providing additional training to all ERO CORs responsible for detention contracts. OAQ is conducting six training sessions that cover various aspects of the COR duties, from roles and responsibilities to invoice payments. OAQ completed initial training sessions prior to the end of October 2018, and copies of the training material have been provided to OIG under separate cover. The CORs are receiving training on the various methods to ensure contract compliance. This includes a session on monitoring and inspections and a session on dealing with unsatisfactory performance. These two trainings will also serve as a baseline for a more specific training to be given to OAQ COs responsible for detention contracts. These training sessions provide CORs and COs with the necessary background information and guidance to issue Discrepancy Reports and request a withholding or deduction of funds.

The OAQ Quality Assurance Division will develop and issue PG that will provide protocols for Discrepancy Reports. The PG will address when to issue a Discrepancy Report, instructions for issuing and approving a report, when to impose a financial penalty, what type of financial penalty to impose, and instructions for imposing a financial penalty. The PG will also include a process to track all Discrepancy Reports issued and financial penalties imposed. ECD: March 31, 2019.

OIG recommended the Executive Associate Director for Enforcement and Removal Operations:

Recommendation 3: Develop protocols to ensure that all existing and future waivers are:
1. approved by ICE officials with appropriate authority;
2. distributed to key stakeholders, such as contracting officers, CORs, and DSMs, who need the waivers to perform core job functions;
3. consistent with contract terms; and
4. compliant with FAR requirements, as applicable.

Response: Concur. ERO, in collaboration with OAQ, will document ICE's waiver process in a policy or standard operating procedure (SOP) that is accessible to stakeholders, such as COs, CORs, and on-site detention services managers (DSMs). The policy or SOP will clearly address when waivers need to be incorporated via contract modification. ICE agrees that documenting the process will provide stakeholders with a better understanding of how waivers are adjudicated and the criteria for approval.

ICE will also review all current waivers to determine continuing applicability and, if appropriate, cancel any waivers that are no longer needed. ICE will ensure the annual or more frequent review of approved waivers by appropriate personnel is included in its documented waiver process.

In addition, ICE will ensure stakeholders have access to approved waivers. Currently, ERO Field Office personnel and facility management staff receive copies of approved waivers. ICE will expand its waiver distribution to DSMs, COs, CORs, and other staff who monitor detention conditions or contract performance. ECD: April 30, 2019.

Recommendation 4: Develop a staffing level for detention CORs, to permit adequate contract oversight and ensure an achievable workload. Evaluate the organizational placement of CORs. If CORs remain under Field Office supervision, develop safeguards to prevent Field Office supervisors from interfering with CORs' ability to fulfill their contract oversight duties.

Response: Concur. ERO will review the workload of its detention facility CORs, and determine an ideal staffing level to oversee its existing contracts. ICE will consider the operational placement of CORs under Field Office supervisors. If CORs remain under Field Office supervision, ERO Leadership will ensure Field Office managers are fully aware of the importance of the CORs' responsibilities and allowing them sufficient time and resources to complete their contract oversight duties. ECD: September 30, 2019.

OIG recommended the Executive Associate Director for Management and Administration:

Recommendation 5: Develop protocols to ensure that CORs and DSMs have full and expedient access to the contract documentation they need to perform core job functions.

Response: Concur. Currently, OAQ copies the COR on every contract action, but there is not a central repository where CORs or DSMs can locate all pertinent contract information if they were not sent the information directly. OAQ has required that every contract document be available electronically on a shared drive. The system currently allows access to OAQ contracting personnel only. ICE will provide CORs and DSMs with read-only access to provide efficient access to contract documentation. ECD: June 30, 2019.

Appendix C
Facility Listing and Quality Assurance Surveillance Plan Status

Detention Facility	Facility Type	QASP Included in Contract
BROWARD TRANSITIONAL CENTER	CDF	YES
DENVER CONTRACT DETENTION FACILITY	CDF	YES
ELIZABETH CONTRACT DETENTION FACILITY	CDF	YES
HOUSTON CONTRACT DETENTION FACILITY	CDF	YES
NORTHEAST OHIO CORRECTIONAL CENTER (YOUNGSTOWN CDF)	CDF	YES
NORTHWEST DETENTION CENTER	CDF	YES
OTAY MESA DETENTION CENTER (SAN DIEGO CDF)	CDF	YES
SOUTH TEXAS DETENTION COMPLEX	CDF	YES
ADELANTO ICE PROCESSING CENTER	DIGSA	YES
ELOY FEDERAL CONTRACT FACILITY	DIGSA	YES
FOLKSTON ICE PROCESSING CENTER (D. RAY JAMES)	DIGSA	YES
IMMIGRATION CENTERS OF AMERICA FARMVILLE	DIGSA	YES
IMPERIAL REGIONAL DETENTION FACILITY	DIGSA	YES
JENA/LASALLE DETENTION FACILITY	DIGSA	YES
MESA VERDE DETENTION FACILITY	DIGSA	YES
OTERO COUNTY PROCESSING CENTER	DIGSA	YES
PINE PRAIRIE CORRECTIONAL CENTER	DIGSA	NO
PRAIRIELAND DETENTION FACILITY	DIGSA	YES
STEWART DETENTION CENTER	DIGSA	YES
ALLEGANY COUNTY JAIL	IGSA	NO
ALLEN PARISH PUBLIC SAFETY COMPLEX	IGSA	NO
BAKER COUNTY SHERIFF'S OFFICE	IGSA	NO
BALDWIN COUNTY CORRECTIONAL CENTER	IGSA	NO
BEDFORD MUNICIPAL DETENTION CENTER	IGSA	NO
BRISTOL COUNTY DETENTION CENTER	IGSA	NO
BURNET COUNTY JAIL	IGSA	NO
BUTLER COUNTY JAIL	IGSA	NO

CABARRUS COUNTY JAIL	IGSA	NO
CALDWELL COUNTY DETENTION CENTER	IGSA	NO
CALHOUN COUNTY CORRECTIONAL CENTER	IGSA	NO
CARVER COUNTY JAIL	IGSA	NO
CHASE COUNTY DETENTION FACILITY	IGSA	NO
CHAUTAUQUA COUNTY JAIL	IGSA	NO
CHIPPEWA COUNTY SSM	IGSA	NO
CHRISTIAN COUNTY JAIL	IGSA	NO
CIBOLA COUNTY CORRECTIONAL CENTER	IGSA	YES
COBB COUNTY JAIL	IGSA	NO
COLLIER COUNTY NAPLES JAIL CENTER	IGSA	NO
DALE G. HAILE DETENTION CENTER	IGSA	NO
DAVIDSON COUNTY SHERIFF	IGSA	NO
DEARBORN POLICE DEPARTMENT	IGSA	NO
DOUGLAS COUNTY DEPARTMENT OF CORRECTIONS	IGSA	NO
EL PASO COUNTY CRIMINAL JUSTICE CENTER	IGSA	NO
ELGIN POLICE DEPARTMENT	IGSA	NO
ESSEX COUNTY CORRECTIONAL FACILITY	IGSA	YES
EULESS CITY JAIL	IGSA	NO
FAIRFAX COUNTY ADULT DETENTION CENTER	IGSA	NO
FREDERICK COUNTY DETENTION CENTER	IGSA	NO
FREEBORN COUNTY ADULT DETENTION CENTER	IGSA	NO
GARVIN COUNTY DETENTION CENTER	IGSA	NO
GASTON COUNTY JAIL	IGSA	NO
GLADES COUNTY DETENTION CENTER	IGSA	NO
GLENDALE POLICE DEPARTMENT	IGSA	NO
GRAND FORKS COUNTY CORRECTIONAL FACILITY	IGSA	NO
HALL COUNTY DEPARTMENT OF CORRECTIONS	IGSA	NO
HARDIN COUNTY JAIL	IGSA	NO
HOWARD COUNTY DETENTION CENTER	IGSA	NO
HUDSON COUNTY CORRECTIONAL CENTER	IGSA	NO
JAMES A. MUSICK FACILITY	IGSA	YES

JEFFERSON COUNTY JAIL	IGSA	NO
JOE CORLEY DETENTION FACILITY	IGSA	YES
JOHNSON COUNTY CORRECTIONS CENTER	IGSA	YES
KENT COUNTY JAIL	IGSA	YES
LINCOLN COUNTY DETENTION CENTER	IGSA	NO
LONOKE POLICE DEPARTMENT	IGSA	NO
MINICASSIA DETENTION CENTER	IGSA	NO
MOFFAT COUNTY JAIL	IGSA	NO
MONROE COUNTY DETENTION CENTER	IGSA	NO
MONROE COUNTY DETENTION-DORM	IGSA	NO
MONTGOMERY CITY JAIL	IGSA	NO
MONTGOMERY COUNTY JAIL	IGSA	NO
MORGAN COUNTY ADULT DETENTION CENTER	IGSA	NO
MORROW COUNTY CORRECTIONAL FACILITY	IGSA	NO
NAVAJO COUNTY SHERIFF	IGSA	NO
NEW HANOVER COUNTY JAIL	IGSA	NO
NOBLES COUNTY JAIL	IGSA	NO
NORTHERN OREGON CORRECTIONAL FACILITY	IGSA	NO
OLDHAM COUNTY JAIL	IGSA	NO
ORANGE COUNTY INTAKE RELEASE FACILITY	IGSA	YES
ORANGE COUNTY JAIL	IGSA	NO
PIKE COUNTY CORRECTIONAL FACILITY	IGSA	NO
PLATTE COUNTY DETENTION CENTER	IGSA	NO
PLYMOUTH COUNTY CORRECTIONAL FACILITY	IGSA	NO
POLK COUNTY ADULT DETENTION FACILITY	IGSA	NO
PULASKI COUNTY JAIL	IGSA	NO
RIO COSUMNES CORRECTIONAL CENTER	IGSA	NO
RIO GRANDE COUNTY JAIL	IGSA	YES
ROANOKE CITY JAIL	IGSA	NO
ROLLING PLAINS DETENTION CENTER	IGSA	NO
SAINT CLAIR COUNTY JAIL	IGSA	YES
SAINT TAMMANY PARISH JAIL	IGSA	NO
SENECA COUNTY JAIL	IGSA	NO
SHAWNEE COUNTY DEPARTMENT OF CORRECTIONS	IGSA	NO
STRAFFORD COUNTY CORRECTIONS	IGSA	NO

SUFFOLK COUNTY HOUSE OF CORRECTIONS	IGSA	NO
TAYLOR COUNTY ADULT DETENTION FACILITY	IGSA	NO
TELLER COUNTY JAIL	IGSA	NO
THEO LACY FACILITY	IGSA	YES
TULSA COUNTY JAIL (DAVID L. MOSS JUSTICE CENTER)	IGSA	NO
WAKE COUNTY SHERIFF DEPARTMENT	IGSA	NO
WAKULLA COUNTY JAIL	IGSA	NO
WHITFIELD COUNTY JAIL	IGSA	NO
WORCESTER COUNTY JAIL	IGSA	NO
YAVAPAI COUNTY DETENTION CENTER	IGSA	NO
YORK COUNTY PRISON	IGSA	NO
YUBA COUNTY JAIL	IGSA	NO

Source: ICE Data (as of June 7, 2018)

Appendix D
Office of Inspections and Evaluations Major Contributors to This Report

Tatyana Martell, Chief Inspector
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Appendix E
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Immigration

Washington state governor OKs bill banning for-profit jails

By RACHEL LA CORTE April 14, 2021

OLYMPIA, Wash. (AP) — One of the country's largest for-profit, privately run immigration jails would be shut down by 2025 under a bill signed Wednesday by Washington Gov. Jay Inslee.

The measure approved by the Washington Legislature bans for-profit detention centers in the state. The only facility that meets that definition is the Northwest Detention Center in Tacoma, a 1,575-bed immigration jail operated by the GEO Group under a contract with U.S. Immigration and Customs Enforcement.

that policy by prohibiting private detention facilities from operating in the state," Inslee said before signing the bill.

Washington joins several states, including California, Nevada, New York and Illinois, that have passed legislation aiming to reduce, limit or ban private prison companies from operating. But Washington is only the third — following Illinois and California — to include immigration facilities as part of that ban.

"Widespread civil immigration detention is one of the greatest miscarriages of justice that currently exists in our political system," Matt Adams, legal director at the Northwest Immigrant Rights Project, said in an email. "The enactment of this bill is an important step towards rejecting the privatization and profiteering model of immigration detention centers that has pushed the massive expansion of immigration detention. "

The new law in Washington state, which is likely to face a legal challenge, would allow GEO to continue operating the jail until its contract with ICE expires in 2025.

GEO sued over a similar 2019 measure in California, and that lawsuit was later consolidated with a Trump administration lawsuit that followed. A federal judge there largely sided with the state, but the case was appealed. It is now before the 9th U.S. Circuit Court of Appeals and is set for oral arguments in June. Last month, the Biden administration filed a brief with the court adopting the arguments of the previous administration, challenging California's law on constitutional grounds.

In a emailed statement, Alexandra Willcox, a spokeswoman for the Dove

Congress Philanthropy Coronavirus pandemic Britney Spears Afghanistan

other private detention companies, wrote that the legislation is "a

government contractors who have zero role in deciding federal immigration policy."

She wrote that the consequences of the center closing could result in migrants being transferred to local jails or "moved far from family and friends."

The Tacoma immigration lockup has long been a target of immigrant rights activists. Washington Attorney General Bob Ferguson is suing to force GEO to pay the state minimum wage to detainees who perform janitorial and other tasks at the jail.

The Northwest Detention Center currently houses fewer than 200 detainees because of pandemic-related precautions. Supporters of the new law argued that the severe drop in immigration detention during the pandemic proved it's not necessary to keep so many immigrants locked up, and they criticized minimum-bed quotas that are written into contracts with private detention facilities.

President Joe Biden has instructed the Justice Department not to renew contracts with private prisons, but that order doesn't apply to the immigration detention system under the Department of Homeland Security.

Associated Press writer Gene Johnson contributed from Seattle and AP correspondent Rebecca Boone contributed from Boise, Idaho.

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Population Reports

To request historical reports, please email the Office of Research Data Concierge Service: data.requests@cdcr.ca.gov (mailto:data.requests@cdcr.ca.gov).

Total Population

- View Weekly Report (Wednesday Reporting Date) (/research/wp-content/uploads/sites/174/2021/09/Tpop1d210922.pdf)
- View Weekly Report Archive 2019 – 2021 (/research/weekly-total-population-report-archive)
- View Monthly Report (/research/wp-content/uploads/sites/174/2021/09/Tpop1d2108.pdf)
- View Monthly Report Archive 2021 (https://www.cdcr.ca.gov/research/ monthly-total-population-report-archive-2021)
- View Monthly Report Archive 2019 – 2020 (https://www.cdcr.ca.gov/research/population-reports/monthly-total-population-report-archive/)

Population Projections

In Spring and Fall of each year, CDCR projects institution and parole populations.

Spring Projections
2021 (https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/05/Spring-2021-Population-Projections.pdf) | 2020 (/research/wp-content/uploads/sites/174/2021/03/Spring-2020-Population-Projections.pdf) | 2019 (/research/wp-content/uploads/sites/174/2021/03/Spring-2019-Population-Projections.pdf)

Fall Projections
2020 (/research/wp-content/uploads/sites/174/2021/03/Fall-2020-Population-Projections.pdf) | 2019 (/research/wp-content/uploads/sites/174/2021/03/Fall-2019-Population-Projections.pdf)

California Department of Corrections and Rehabilitation
Division of Correctional Policy Research and Internal Oversight
Office of Research
August 11, 2021

Weekly Report of Population
As of Midnight August 11, 2021

Total CDCR Population

Population	Felon/ Other	Change Since Last Week	Change Since Last Year	Design Capacity	Percent Occupied	Staffed Capacity
A. Total In-Custody/CRPP Supervision	99,130	+147	-4,039			
I. In-State	99,130	+147	-4,039			
(Men, Subtotal)	95,239	+144	-4,044			
(Women, Subtotal)	3,891	+3	+5			
1. Institution/Camps	95,988	+154	-3,002	88,078	109.0	125,385
Institutions	94,276	+140	-2,605	84,710	111.3	121,991
Camps(CCC, CIW, and SCC)	1,712	+14	-397	3,368	50.8	3,394
2. In-State Contract Beds	2,074	+10	-1,242			
Community Prisoner Mother Program	3	0	-11			
California City Correctional Facility	2,071	+10	-80			
3. Department of State Hospitals	179	-3	-69			
4. CRPP Supervision	889	-14	+274			
Alternative Custody Program	32	-3	+2			
Custody to Community Treatment Reentry Program	293	-3	+76			
Male Community Reentry Program	471	-7	+147			
Medical Parole	67	-1	+35			
Medical Reprieve Program	22	0				
Medically Vulnerable Release	4	0	-5			
B. Parole	48,530	-315	-6,843			
Community Supervision	46,990	-313	-6,782			
Interstate Cooperative Case	1,540	-2	-61			
C. Non-CDCR Jurisdiction	3,017	-89	+1,844			
Other State/Federal Institutions	251	-1	-54			
Out of State Parole	755	-2	+21			
Out of State Parolee at Large	16	0	0			
DJJ-W&IC 1731.5(c) Institutions	9	0	-8			
County Jail	1,986	-86	+1,885			
D. Other Populations	8,546	+2	+973			
Temporary Release to Court and Hospital	1,396	-5	-260			
Escaped	196	0	-4			
Parolee at Large	6,954	+7	+1,237			
Total CDCR Population	159,223	-255	-8,065			

This report contains the latest available reliable population figures from SOMS. They have been carefully audited, but are preliminary, and therefore subject to revision.

California Department of Corrections and Rehabilitation
Division of Correctional Policy Research and Internal Oversight
Office of Research
August 11, 2021

Weekly Report of Population
As of Midnight August 11, 2021

Weekly Institution Population Detail

Institutions	Felon/ Other	Design Capacity	Percent Occupied	Staffed Capacity
Male Institutions				
Avenal State Prison (ASP)	3,443	2,909	118.4	4,387
Calipatria State Prison (CAL)	2,860	2,308	123.9	3,451
California Correctional Center (CCC)	2,187	3,377	64.8	3,427
California Correctional Institution (CCI)	2,805	2,739	102.4	4,145
Central California Women's Facility (CCWF)	14	1,990	0.7	3,068
Centinela State Prison (CEN)	2,878	2,308	124.7	3,446
California Health Care Facility - Stockton (CHCF)	2,441	2,953	82.7	2,951
California Institution for Men (CIM)	2,427	2,736	88.7	4,226
California Institution for Women (CIW)	7	1,281	0.5	1,494
California Men's Colony (CMC)	3,047	3,816	79.8	4,407
California Medical Facility (CMF)	2,017	2,318	87.0	2,921
California State Prison, Corcoran (COR)	3,276	3,115	105.2	4,476
California Rehabilitation Center (CRC)	2,434	2,380	102.3	3,174
Correctional Training Facility (CTF)	4,611	3,300	139.7	4,929
Chuckawalla Valley State Prison (CVSP)	2,190	1,738	126.0	2,579
Folsom State Prison (FOL)	2,323	2,065	112.5	3,148
High Desert State Prison (HDSP)	3,220	2,324	138.6	3,461
Ironwood State Prison (ISP)	2,[illegible]	3,200	107.0	3,300
Kern Valley State Prison (KVSP)	3,427	2,448	140.0	3,622
California State Prison, Los Angeles County (LAC)	2,[illegible]	2,300	116.3	3,400
Mule Creek State Prison (MCSP)	3,853	3,284	117.3	4,155
North Kern State Prison (NKSP)	3,774	2,694	140.1	4,011
Pelican Bay State Prison (PBSP)	2,128	2,380	89.4	3,361
Pleasant Valley State Prison (PVSP)	2,651	2,308	114.9	3,433
RJ Donovan Correctional Facility (RJD)	3,300	2,992	110.3	4,182
California State Prison, Sacramento (SAC)	2,080	1,828	113.8	2,545
California Substance Abuse Treatment Facility (SATF)	5,050	3,424	147.5	5,111
Sierra Conservation Center (SCC)	3,268	3,404	96.0	4,250
California State Prison, Solano (SOL)	3,281	2,594	126.5	4,056
San Quentin State Prison (SQ)	2,598	3,084	84.2	3,984
Salinas Valley State Prison (SVSP)	3,000	2,452	122.3	3,509
Valley State Prison (VSP)	2,976	1,961	151.8	2,954
Wasco State Prison (WSP)	3,815	2,984	127.8	4,447
Male Total	92,410	84,404	109.5	120,010
Female Institutions				
Central California Women's Facility (CCWF)	2,337	1,990	117.4	3,068
California Institution for Women (CIW)	986	1,281	77.0	1,777
Folsom State Prison (FOL)	255	403	63.3	530
Female Total	3,578	3,674	97.4	5,375
Institution Total	95,988	84,404	113.7	125,385

California Department of Corrections and Rehabilitation
Division of Correctional Policy Research and Internal Oversight
Office of Research
August 11, 2021

Weekly Report of Population
As of Midnight August 11, 2021

Notes

Felon/Other counts are felons, county contract boarders, federal boarders, state boarders, safekeepers, county diagnostic cases, Department of Mental Health boarders, and Division of Juvenile Justice boarders.

Interstate Cooperative Cases are parolees from other states being supervised in California.

Non-CDCR Jurisdiction are California cases being confined in or paroled to other states or jurisdictions.

Welfare and Institution Code (W&IC) 1731.5(c) covers persons under the age of 21 who were committed to CDCR, had their sentence amended, and were incarcerated at the Division of Juvenile Justice for housing and program participation.

Other Population includes inmates temporarily out-to-court, inmates in hospitals, escapees, and parolees at large.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
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Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
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			TOTAL:	$

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